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M. 20

44

REPORTS OF CASES  
DECIDED IN THE  
COURT OF APPEALS,  
OF THE  
STATE OF NEW YORK,  
FROM AND INCLUDING A PORTION OF THE DECISIONS HANDED DOWN  
JANUARY 18, 1876, TO THE DECISIONS OF APRIL 18, 1876;  
WITH  
NOTES, REFERENCES AND INDEX.

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BY H. E. SICKELS,  
STATE REPORTER.

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VOL. XIX.

ALBANY:  
A. BLEECKER BANKS, LAW PUBLISHER,  
473 AND 475 BROADWAY.  
1877.

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## JUDGES OF THE COURT OF APPEALS.

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SANFORD E. CHURCH, CHIEF JUDGE.

WILLIAM F. ALLEN,

CHARLES J. FOLGER,

CHARLES A. RAPALLO,

CHARLES ANDREWS,

THEODORE MILLER,

ROBERT EARL,

ASSOCIATE JUDGES.



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**CASES DECIDED**  
**IN THE**  
**COURT OF APPEALS**  
**OF THE**  
**STATE OF NEW YORK,**

**COMMENCING JANUARY 18, 1876.**

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| 64  | 1   |
| 134 | 530 |

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**CALVIN HAINES et al., Respondents, v. SARAH E. HOLLISTER  
et al., Appellants.**

**An assignee for the benefit of creditors of an insolvent copartnership, the representatives of a deceased partner, and the surviving partners may properly be joined as parties defendant, and an action may properly be brought against them by a creditor of the firm, to compel the assignee to account and pay over to plaintiff his share of the proceeds of the partnership property, and (it being alleged in the complaint that the surviving partners are insolvent) to recover of the representatives the balance of plaintiff's claim. (ALLEN and EARL, JJ., dissenting.)**

***Grant v. Shuster* (1 Wend., 152) distinguished.**

***It seems*, it is not necessary in such an action that the other creditors should be made parties, or that the action should be brought in their behalf.**

**Even if it were necessary, when it does not appear upon the face of the complaint that there are other creditors, this is not a good ground for demurrer.**

**(Argued December 22, 1875; decided January 18, 1876.)**

**APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, in favor of plaintiffs, entered upon an order affirming an order of**





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IN THE  
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APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, in favor of plaintiffs, entered upon an order affirming an order of

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Statement of case.

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Special Term overruling a demurrer on the part of defendants Sarah E. Hollister and James Simmons to plaintiffs' complaint.

The complaint in this action alleged, in substance, that prior to July, 1869, E. M. Hollister, defendant Sarah E. Hollister's intestate, and defendants Jones, Newman and M. M. Hollister, were partners; that their firm was indebted to plaintiffs upon two promissory notes; that said firm became insolvent, and the individual members thereof made an assignment for the benefit of its creditors, of all the partnership property and effects, to defendant Simmons; that Simmons accepted the trust, but has never made any settlement or accounting; that said E. H. Hollister died, leaving a large estate; that the surviving partners are and have been since May, 1869, utterly insolvent. Plaintiffs asked judgment, among other things, that defendant Simmons render an account of the assigned property, and pay over to plaintiffs to apply on said notes the proportion of the assets to which they are entitled, and that judgment be rendered against said Sarah E. Hollister as administratrix, etc., for the balance unpaid, and for such further relief, etc.

The defendant Sarah E. Hollister demurred: first, that several causes of action were improperly united; second, that as against her the complaint did not state facts sufficient to constitute a cause of action.

Defendant Simmons also demurred on the same grounds; and also that there was a defect of parties, none of the other creditors of the firm except plaintiffs having been made parties.

The demurrers were overruled, with leave to said defendants to answer.

*W. F. Cogswell* for the appellants. The demurrer on the ground that causes of action were improperly joined was well taken. (Code, § 167; *Grant v. Shuster*, 1 Wend., 152; *Gardner v. Walker*, 22 How., 405; *Union Bk. v. Mott*, 27 N. Y., 633; *Voorhis v. Childs*, 17 id., 354; *Richter v. Poppen-*

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Opinion of the Court, per MILLER, J.

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heusens, 42 id., 373.) The complaint did not state facts sufficient to constitute a cause of action. (*Wakeman v. Grover*, 4 Paige, 23.)

A. *Holmes* for the respondents. Plaintiffs could proceed against the surviving partners of the firm and the representatives of the deceased partner jointly. (*Lawrence v. L. and W. Orphan House*, 2 Den., 577; *Voorhees v. Baxter*, 1 Abb. R., 43; *Parker v. Jackson*, 16 Barb., 44, 45; *Stahl v. Stahl*, 2 Lans., 60, 66; *Hammersley v. Lambert*, 2 J. Ch., 507, 509; *Van Riper v. Poppenheusens*, 43 N. Y., 68, 74; *Pope v. Cole*, 55 id., 124.) To sustain a demurrer for non-joinder of a defendant, it must appear that the party not joined is jointly liable with the one sued. (*Hillman v. Hillman*, 14 How. Pr., 459; *Newbould v. Warren*, 14 Abb., 80, 85, 86; *Stockwell v. Wager*, 30 How., 271; *Wooster v. Chamberlain*, 28 Barb., 602.)

MILLER, J. The joinder of the administratrix of Emmett H. Hollister as a defendant, with the surviving partners of the firm of which he was a member while living, is no valid ground of demurrer to the complaint. It appears from the complaint that the surviving partners are insolvent, and nothing can be collected from them, and when this is averred, the plaintiff may proceed in equity against the surviving partners, and the representatives of a deceased partner jointly. (*Lawrence v. Leake & Watt's Orphan Asylum*, 2 Denio, 577; *Parker v. Jackson*, 16 Barb., 44, 45.) See also *Van Riper v. Poppenhausen* (43 N. Y., 68); *Pope v. Cole* (55 id., 124), which have a bearing upon the question as to the liability of the representative of a deceased partner, where the survivors are insolvent. As this is an equity action, the assignee of the firm, who had received its assets and never rendered any account for the same, was a proper party. He represents the firm, stands in its place so far as property is concerned, and the avails of the same in his hands are first liable to be appropriated to pay the demand of the plaintiffs.

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Opinion of the Court, per MILLER, J.

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No valid reason exists why a person thus situated is not a proper party, in connection with the survivors of the copartnership and the representative of the deceased partner. If it were otherwise several actions would be required, and while no rule of law is violated, the ends of justice are answered by such a joinder. The case of *Grant v. Shurter* (1 Wend., 148), cited by the defendants' counsel, relates to actions at law, and contains nothing inconsistent with the views expressed. The same remarks are applicable to the other cases cited in the same connection.

The objection that the other creditors should have been made parties, or that the action should have been brought on their behalf, is not well taken. The fact that other creditors exist does not appear upon the face of the complaint, and independent of any thing which is apparent, the plaintiffs are the only creditors. Besides, under the act of 1860 (§ 64, p. 595), any creditor of the assignor may compel an accounting.

If there is a defect of parties it must be apparent to entitle a defendant to demur on that account. (Code, § 144.) So, also, if this defect actually exists, if it does not appear upon the face of the complaint, the objection should be taken by answer. (Code, § 147.) The joinder of the different parties presents no difficulty in the way of entering up a proper judgment, and even if the prayer of the complaint is erroneous in asking for a judgment against the survivors of the copartnership, for the balance remaining unpaid, the complaint is not demurrable for that reason. Upon the whole, as the action was of an equitable nature, all of the defendants, who, it appears, were in some way interested, were proper parties. The survivors, as the original debtors, had a right to be notified of the proceedings which affected their interests, as well as the administratrix, as the representative of a deceased copartnership, and the assignee who had the property of the firm in charge, and represented the entire copartnership. Without all of them there would be a want of proper parties. And in this form the rights of all the parties

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Statement of case.

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would be fully protected, and the whole controversy in which each of them had some interest be lawfully disposed of.

The judgment was right and should be affirmed, with costs.

All concur; except ALLEN and EARL, JJ., dissenting; CHURCH, Ch. J., not voting.

Judgment affirmed.

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| 186 | 12 |

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ANNIE MALONE, Administratrix, Respondent, v. HENRY B. HATHAWAY, Survivor, etc., Appellant.

A master is not responsible to an employee for the negligent act of a competent and proper foreman to whom there has been no delegation of power and control of the business or a branch thereof, but who is simply charged with special duties, performing them under the direction of the master, the latter retaining general control and supervision.

It is only where the master withdraws from the management of the business, intrusting it to a middleman or superior servant; or where, as in case of a corporation, the business is of such a nature that the general management and control thereof is necessarily committed to agents, that the master can be held liable to a subordinate for the negligent acts of one thus acting in his stead.

Defendant's firm was engaged in operating a brewery, the partners themselves personally superintending the business. They employed B., a competent and experienced carpenter to make examinations and repairs for the purpose of keeping the brewery in a safe condition. By the giving way of some joists or posts supporting a mash tub, which had become decayed, the tub fell, causing the death of plaintiff's intestate, a laborer in the employ of defendant's firm. New and proper supports had been put in about eleven months before the accident. The decay was not visible, and no evidence was given that defendant or his partner knew or ought to have known that the supports were defective. The court submitted the case to the jury upon the question as to whether there was negligence on the part of B. in omitting to examine and keep the building in repair, ruling, in substance, that if such negligence was found defendant was liable. *Held* (CHURCH, Ch. J., and RAPALLO, J., dissenting), error; that for such negligence defendant was not liable, in the absence of evidence of any neglect or omission of duty on the part of his firm.

*Laning v. N. Y. C. R. R. Co.* (49 N. Y., 521), and *Flike v. B. and A. R. R. Co.* (53 N. Y., 549) distinguished.

(Argued May 27, 1875; decided January 18, 1876.)

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Statement of case.

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APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, affirming a judgment in favor of plaintiff entered upon a verdict.

This action was brought against defendant as surviving partner of the firm of Bevier & Co., for the alleged negligence of defendant's firm causing the death of Thomas Malone, plaintiff's intestate. Said firm were carrying on a brewery in the city of Rochester and Malone was employed therein as a laborer. The partners themselves personally superintended and managed the business. A Mr. Bagley, a competent and experienced carpenter, was employed by the firm to keep the building and fixtures in repair and in a good and safe condition; he was furnished with all necessary means and materials and spent all his time in and about the building. The supports to one of the mash tubs gave way; the tub fell upon Malone causing his death. About eleven months before the accident the supports to the tub had been repaired, new and proper posts and joists having been put in, and all of the supports were then sound. The evidence tended to show that the top of one of the posts and some of the joists had become decayed; the decay was not visible. The court charged, among other things, that the master might devolve the duty of providing a safe and secure building upon another competent person but he does so at the risk of that other person doing the duty, and is responsible for his neglect to perform it, and that the question in the case was: "Was Mr. Bagley, the man upon whom was devolved the business of repairing this building, guilty of a want of ordinary care and prudence in providing that the building should be kept ordinarily secure." To this portion of the charge defendant's counsel duly excepted. Further facts appear in the opinions.

*J. C. Cochran* for the appellant. The judge erred in charging that defendant was responsible for the negligence of the carpenter. (*Hofnagle v. N. Y. C. and H. R. R. Co.*, 55 N. Y., 608; *Chapman v. Erie R. Co.*, id., 579.) Skill and diligence could only be required of defendant in regard to

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Opinion of the Court, per ALLEN, J.

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repairs and not in the construction of the building. (*De Graff v. N. Y. C. and H. R. R. R. Co.*, 3 N. Y. S. O., 255; *Unger v. Forty-second St. R. R. Co.*, 51 N. Y., 497.) The court erred in refusing to charge that defendant was not liable for negligence of its agents of which it had no notice. (*Warner v. Erie R. Co.*, 39 N. Y., 468; *Wright v. N. Y. C. R. R. Co.*, 25 id., 562; *Laning v. N. Y. C. R. R. Co.*, 49 id., 521; *Wilson v. Merry*, L. R., 1 Scotch App., 326, cited 39 N. Y., 326; *Gallagher v. Pifer*, 16 O. B. [N. S.], 669; *Frazier v. Penn. R. R. Co.*, 38 Penn., 104; *Monan v. N. Y. C. and H. R. R. R. Co.*, 3 S. O. R., 770.)

*James B. Perkins* for the respondent. The motion for a nonsuit was properly denied. (*Marshall v. Stewart*, 33 E. L. and Eq., 1; *Ryan v. Fowler*, 24 N. Y., 410, 413; *Warner v. Erie R. Co.*, 39 id., 468, 475; *Laning v. N. Y. C. R. R. Co.*, 49 id., 521; *Plank v. N. Y. C. and H. R. R. R. Co.*, 1 N. Y. S. O., 319, 323; *Flike v. B. and A. R. R. Co.*, 53 N. Y., 549; *Combs v. N. R. C. Co.*, 102 Mass., 572, 599.) Defendant was liable although he had employed skillful agents. (*Ryan v. Fowler*, 24 N. Y., 410; *Hefferman v. Benkard*, 1 Robt., 432; *Seabrook v. Hecker*, 2 id., 291.) The fact that Malone was a co-employee does not relieve defendant from liability. (*Connolly v. Poillon*, 41 Barb., 366; 41 N. Y., 619; *Ryan v. Fowler*, 24 id., 413; *Laning v. N. Y. C. R. R. Co.*, 49 id., 521.)

ALLEN, J. The recovery was had in this action solely by reason of the negligence of a co-employee of the plaintiff's intestate. The issue, under the instructions to the jury, was narrowed down to the question, "whether there was negligence on the part of Bagley; an omission of that ordinary and reasonable degree of care and prudence which a man of ordinary and reasonable care and prudence will exercise in the conduct of his own affairs."

The jury were told that if there was no such negligence, the defendants were entitled to a verdict. The alleged neg-

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Opinion of the Court, per ALLEN, J.

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ligence, which was thus made the sole subject of inquiry, was the omission to examine and securely to repair the supports of the mash tub which had been repaired, and in fact replaced, but eleven months before its fall, resulting in the death of the intestate. At that time it was, as was assumed on the trial without objection on the part of the plaintiff, or a request to submit any question of fact in respect thereto to the jury, well and properly constructed, and securely placed, and the beams and posts upon which it rested sound and in good condition. No personal neglect or want of care was charged upon the defendants either in examining into the condition of the supports, or in repairing them, nor was it claimed that they knew, or ought to have known, that repairs were necessary to the proper support of the burden resting upon them, or the safety of those employed in the building. Neither were the defendants charged with any omission of duty or want of proper care in the selection of competent servants and agents to make proper and needful repairs in every part of the building, and the fixtures, or furnishing proper and suitable materials for that purpose. We concur in the opinion of Judge SMITH, in the Supreme Court, that the cause was submitted to the jury upon an erroneous issue. The rule is well settled, and is salutary as tending to induce proper care on the part of servants and employes, and as limiting the liability of masters for injuries to their servants to their own personal acts or omissions of duty, that a master is not liable to his servants for the negligence or want of care of fellow-servants who have not been negligently appointed or retained in service. (*Wright v. N. Y. C. R. R. Co.*, 25 N. Y., 562; *Priestly v. Fowler*, 3 M. & W., 1; *Hoffnagle v. N. Y. Cen. and Hud. R. R. Co.*, 55 N. Y., 608.) For one's own negligence there is no difference between liability to a stranger, or to a servant. It makes no difference in the application of the rule exempting the master from liability for injuries to his servants for the acts of coservants, that the one receiving the injury is inferior in grade, and subject to the orders of the one by whose negligence the injury is caused, if both are engaged in the same



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Opinion of the Court, per ALLEN, J.

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general business, accomplishing one and the same general purpose. (*Warner v. Erie R. Co.*, 39 N. Y., 468; *Feltham v. England*, L. R., 2 Q. B., 33.)

It is not of any consequence that the negligent servant by whose want of care or skill harm comes to another servant in the same general employ, is charged with some special authority or duty, and that the two, the injured and the one causing the injury, are not equal in station and authority. The fact that the careless and negligent servant is placed in superintendence or authority over the others does not constitute an exception to the general rule. (*Wilson v. Merry*, L. R., 1 Scotch and Div. App., 326.)

An exception has been engrafted upon the rule, and in the application of that exception the learned judge at the trial fell into the error suggested. When the servant by whose acts of negligence or want of skill other servants of the common employer have received injury is the "*alter ego*" of the master, to whom the employer has left every thing, then the middleman's negligence is the negligence of the employer for which the latter is liable. The servant in such case represents the master, and is charged with the master's duty. (59 N. Y., 517; *Murphy v. Smith*, 19 C. B. [N. S.], 361.) When the middleman or superior servant employs and discharges the subalterns, and the principal withdraws from the management of the business, or the business is of such a nature that it is necessarily committed to agents as in the case of corporations, the principal is liable for the neglects and omissions of duty of the one charged with the selection of other servants in employing and selecting such servants and in the general conduct of the business committed to his care. This is the extent and effect of the decision in *Laning v. N. Y. C. R. R. Co.* (49 N. Y., 521), which I think has been greatly misapprehended. It was not intended in that case to disturb the general rule of law, limiting the liability of masters to their servants for injuries received while in their service, or to enunciate any new proposition. A proposition there very much pressed upon the court was,

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Opinion of the Court, per ALLEN, J.

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that a corporation has discharged its whole duty to its servants of a lower rank, when it has employed skillful and competent general agents and superintendents; and that the negligence of such agents or superintendents is not the negligence of the corporation, nor is it liable therefor. Much of the opinion is given to a consideration of that proposition, and general remarks made in refutation of it have been applied to other circumstances and erroneous deductions made. The defendant was held liable under the circumstances of that case for the negligent and improper retention by Colby, of an incompetent and drunken laborer, through whose incompetency and bad habits the plaintiff received the injury complained of, for the reason that Colby was regarded as representing the defendant corporation and performing its duty in the employment of laborers and servants, and notice to Colby of the incompetency and unfitness of Westman was regarded as notice to the defendant. The result necessarily followed the conclusion of the court, that he was the general agent and representative of the defendant, and not a mere fellow-servant with the others charged with some special duty. His omission in such case was the omission of the principal, and his failure to furnish suitable and competent laborers, and proper materials and implements for the work was attributable to the corporation of which he was the general agent in that department. Such an agency must not be confounded with the position of a mere foreman, one charged with special duties, but performing them under general or special instructions from the principal who retains and has the general supervision of the business and to whom, and whose immediate direction, all are subject. *Flike v. Boston and Albany R. R. Co.* (53 N. Y., 549), was decided upon the same general principle, that the "head conductor" whose duty it was to make up the morning trains and employ and station the brakemen, was *pro hac vice* the general agent and representative of the corporation for whose acts and neglects the latter was responsible, and that his neglect to furnish brakemen, sufficient in number and capacity for the service, was

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Opinion of the Court, per ALLEN, J.

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the neglect of the defendant to perform a duty which the law cast upon it. The dissents in that case, as well as that in *Laning's Case*, were not to the principle, but to the application of it to the facts and circumstances of those cases, and the position of the employes for whose faults the employer was charged. Those cases are not subject to criticism. The law was well adjudged as all the members of the court agreed; the only dissent in opinion was as to the relation and position occupied by the servants whose acts were under discussion. Bagley's situation was that of foreman merely, having no general charge, except such as is common to those acting in that capacity. The defendants were present and had the general charge of and responsibility for the different branches of the business carried on by them. If it was claimed that Bagley's position and responsibilities were different from that named as foreman, and that the defendants had transferred the charge and direction of any branch of the business and of their duties upon him, it would have been a proper question for the jury if, indeed, there was any evidence to warrant the claim.

In *Wilson v. Merry* (*supra*), the injury was caused by the negligence of the general manager of the works of the defendants at the coal pit, and the defendants having selected proper and competent persons to superintend and direct the work, and furnished them with adequate materials and resources, were not liable to the co-employes of the general manager or foreman, for injuries received through his carelessness or want of skill. The unskillful and improper erection of a scaffold by the foreman or manager, as a means for the prosecution of the work of those employed, destroyed the ventilation of the mine which was sufficient before, and caused an explosion of fire-damp, resulting in the death of the plaintiff's son. The same principle is illustrated and applied in *Feltham v. England* (L. R., 2 Q. B., 33); *Murphy v. Smith* (19 C. B. [N. S.], 361); *Gallagher v. Piper* (16 id., 669, 692); *Warner v. Erie R. Co.* (39 N. Y., 468). Corporations necessarily acting by and through agents, those having the super-

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Dissenting opinion, per CHURCH, Ch. J.

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intendence of various departments with delegated authority to employ and discharge laborers and employes, provide materials and machinery for the service of the corporation, and generally direct and control under general powers and instructions from the directors, may well be regarded as the representative of the corporation charged with the performance of its duty, exercising the discretion ordinarily exercised by principals, and within the limits of the delegated authority the acting principal. These acts are in such case the acts of the corporation for which, and for whose neglect, the corporation within adjudged cases must respond, as well to the other servants of the company as to strangers. They are treated as the general agents of the corporation in the several departments committed to their care. (*Wright v. N. Y. C. R. R. Co.*, *supra*; *Frazier v. Penn. R. Co.*, 38 Penn. St. R., 104; *Laning v. N. Y. C. R. R. Co.* and *Flike v. B. and A. R. R. Co.*, *supra*; *Coombs v. New Bedford Cordage Co.*, 102 Mass., 572; *Ford v. Fitchburg R. Co.*, 110 id., 240.) A person thus placed by a corporation, in such a position of trust and authority, may be fairly considered as its representative *pro hac vice*. But when the principal is an individual acting *sui juris*, and there is no evidence of a surrender of power and control to any subordinate, and is present himself superintending the establishment in person, no such presumption arises, or responsibility attaches in respect of the acts of a competent and proper foreman, selected by and in the employment of the principal.

There was no warrant for holding, as matter of law, the defendants in this case liable to the plaintiff's intestate for the neglect and want of care of Bagley, the foreman of the carpenters employed in the brewery.

The judgment must be reversed, and a new trial granted

CHURCH, Ch. J. (dissenting). The material question involved in this action as to liability of the principal for injuries arising from the negligence of employes, has been frequently before the court, and in respect to which, as will be seen by reference to the cases, there is some difference

## Statement of case.

of opinion among members of the court. The principle upon which the verdict in this case was obtained has been, in my opinion, adjudicated in several cases in this court. The duty of maintaining the building in a secure and safe condition, at all times, for workmen employed in the building, was a duty devolving upon the principal. He was bound to exercise proper care to prevent the accident which occurred, and when he delegated that duty to Bagley, the latter represented the principal, and the principal is responsible for his acts and omissions in respect to such duty. Although disclaimed by my brethren, I cannot but think that the reversal of the judgment will be deemed at variance with the rule heretofore adopted by this court in *Laning v. N. Y. C. R. R. Co.* (49 N. Y., 521), and *Flike v. B. and A. R. R. Co.* (53 id., 549, and 59 id., 517).

All concur with ALLEN, J.; except CHURCH, Ch. J., and RAPALLO, J., dissenting.

Judgment reversed.

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| 64  | 13  |
| 115 | 109 |

WILLIAM FALLON, Jr., by his Guardian, etc., Respondent,  
v. THE CENTRAL PARK, NORTH AND EAST RIVER RAILROAD  
COMPANY, Appellant.

Plaintiff, a child five years old, resided with his mother on the first floor of a tenement-house communicating directly by a flight of stairs with the street. Plaintiff had been playing in the back yard, and came in for a drink of milk, which the mother gave to him, and he sat down at a table to drink it. She went into a bed-room adjoining, leaving the door open and telling him to go back into the yard. The door leading to the street was open. He went out on to the street, and in five minutes from the time his mother left him was run over and injured by one of defendant's cars, through the negligence of the driver. The mother testified that she had never known him to go out into the street alone before. In an action to recover damages for the injury, *held*, that the evidence did not establish contributory negligence on the part of the mother, as matter of law; but that it was a question of fact, and properly submitted to the jury.

(Argued December 21, 1875; decided January 18, 1876.)

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Statement of case.

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APPEAL from judgment of the General Term of the Court of Common Pleas of the city and county of New York, affirming a judgment in favor of plaintiff entered upon a verdict, and affirming an order denying a motion for a new trial.

This action was brought to recover damages for injuries alleged to have been caused by the negligence of defendant. The plaintiff, a child a little over five years of age, resided with his parents in a tenement-house on First avenue in the city of New York. They occupied rooms on the first floor above the street, and nearly on a level with the back yard, with which they communicated. A flight of stairs led to the street. Plaintiff came in from the back yard and asked his mother for a drink of milk. This she gave to him, and he sat down at the table to drink it. His mother went into an adjoining bed-room to change her dress, telling him to go back to the yard. The bed-room door was left open. Instead of returning to the back yard, plaintiff went down the stairs and out of the door, which was open, into the street, where he was knocked down by the horses attached to one of defendant's cars and run over, the evidence tending to show that the accident was occasioned by the negligence of defendant's driver. In five minutes from the time the mother left plaintiff, word came to her that he was injured. The mother testified that she had never known plaintiff to go out into the street alone before.

Defendant's counsel moved for a dismissal of the complaint on the trial upon the ground, among others, that the evidence showed that the parents of the plaintiff were guilty of negligence contributing to the injury, and that the plaintiff was also guilty of contributory negligence. The motion was denied, and defendant's counsel duly excepted. Defendant's counsel requested the court to charge that plaintiff could not recover if he was guilty of any negligence contributing to the injury. The court so charged, with the qualification, provided "the jury believed plaintiff was *sui juris*." To the qualification defendant's counsel duly excepted. Defendant's counsel also

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asked the court to charge that plaintiff was bound to exercise the degree of care which a person of ordinary prudence would exercise in like circumstances. The court refused so to charge, but charged as requested, adding the words, "of his age" after the word "person." To this defendant's counsel duly excepted. Defendant's counsel also requested the court to charge, that if the jury should find that the plaintiff was not *sui juris*, or not of that age and intelligence that it was safe to trust him in the street unattended, then it was negligence on the part of the mother to allow plaintiff in the street, as she did, and the verdict must be for the defendant. The court refused so to charge, and in respect to said request charged: "I leave it to you to say whether, under all the circumstances, it was negligence on the part of the plaintiff's parents to do as they did; and if you come to the conclusion it was, then your verdict should be for the defendants." To the refusal and the charge counsel duly excepted.

*A. J. Vanderpoel* for the appellant. The evidence established contributory negligence on the part of the plaintiff and his mother. (*Willetts v. Buff. and Roch. R. R. Co.*, 22 Barb., 585; *Honingsberger v. Second Ave. R. R. Co.*, 1 Keyes, 570, 573; *Flynn v. Hatton*, 43 How., 333; 4 Daly, 552; *Hatfield v. Roper*, 21 Wend., 615; *Waite v. N. E. R. Co.*, E., B. & B., 719; 96 E. C. L. R.; *Mangam v. Bklyn. City R. R. Co.*, 38 N. Y., 455; *Wright v. M. and M. R. R. Co.*, 4 Al., 283; *Chicago v. Starr*, 42 Ill., 174.) If plaintiff was *sui juris* he was guilty of negligence. (*Solomon v. C. R. R. Co.*, 1 Swe., 298; *Ernst v. H. R. R. Co.*, 24 How., 97; *Nicholson v. E. R. R. Co.*, 41 N. Y., 542; *Baxter v. T. and B. R. R. Co.*, 41 id., 502; *Griffin v. N. Y. C. R. R. Co.*, 40 id., 34; *Wilcox v. Rome, etc., R. R. Co.*, 39 id., 358; *Wilds v. H. R. R. Co.*, 29 id., 315; *Harty v. Cent. Co. of N. J.*, 42 id., 472; Campb. on Neg., 69; *Johnson v. H. R. R. Co.*, 20 N. Y., 73; 1 Keyes, 574; *Abbott v. Macfie*, 33 L. J. [Ex.], 117; *Mangam v. Allerton*, L. R., 1 Ex., 239; 12 Am. L. Reg., 757; *Lygo v. Newbold*, 9 Exch., 302.)



*Edward D. McCarthy* for the respondent. Plaintiff was *non sui juris*, and therefore incapable of negligence. (*Ihl v. Forty-second Street R. R. Co.*, 47 N. Y., 317; *Mangam v. Bklyn. City R. R. Co.*, 38 id., 455; *Honegsberger v. Second Ave. R. R. Co.*, 1 Daly, 89; *Prendergast v. N. Y. C. and H. R. R. Co.*, 58 N. Y., 652; *Robinson v. Cove*, 22 Vt., 213; *Birge v. Gardiner*, 19 Conn., 507.) Defendant was guilty of gross negligence. (*Johnson v. H. R. R. Co.*, 20 N. Y., 65.) Plaintiff's mother was not guilty of contributory negligence. (19 Conn., 507; 26 id., 598; 37 id., 199; 8 Minn., 160; 18 Ohio St., 399; 36 Mo., 490; 1 Head, 620; 22 Vt., 213; 7 Penn. St., 372; 31 id., 358; 47 id., 300; 57 id., 172, 187; 5 Exch., 240, 243; 4 id., 244; 6 M. & W., 499; 4 C. & P., 262; 4 Bing., 644; 98 Exch., 302; 1 F. & F., 359; 38 N. Y., 260; 22 Vt., 225; 19 Conn., 506; *Lynch v. Nurdin*, 1 Ad. & E. [N. S.], 29; *Oldfield v. N. Y. and H. R. R. Co.*, 14 N. Y., 310; *MacMahon v. Mayor, etc.*, 33 id., 642; *O'Mara v. H. R. R. Co.*, 38 id., 445.)

CHURCH, Ch. J. The point principally relied upon by the learned counsel for the defendant is, that as a question of law the plaintiff could not recover, on the ground of the negligence of his mother, in permitting him to be in the street unattended. If this position cannot be maintained, no fault can be found with the charge of the court. The court charged, that if the mother omitted to exercise such care, in respect to the child, as persons of ordinary prudence would exercise under the circumstances, or if the child omitted to exercise such care as might reasonably be expected from one of his age, the verdict should be for the defendant. The child was over five years of age, and it was submitted to the jury to say whether he was *sui juris*.

The inquiry, therefore, is whether there were any facts proved sufficient to enable the jury to relieve the plaintiff from the imputed negligence of his mother. It appears that the mother resided in a tenement-house, on the first floor, leading into the back yard, and also into the street, down



some stairs. The plaintiff had been playing in the back yard, with other children, and came in for a drink of milk. The mother gave him the milk, and he sat at the table to drink it, when the mother passed into the bed-room adjoining, to adjust her dress, leaving the door open, and telling the child to go back into the yard, and in five minutes notice was brought that the child was injured. The mother testified that the child had never before been in the street. Upon these facts, which we must assume for the purpose of this question the jury regarded as true, can it be affirmed that in law the mother was negligent. True, the child did pass into the street, but that fact is not conclusive. Effectual protection is not indispensable. Ordinary care relieves from the charge of negligence. Although a child five years old cannot be regarded as *sui juris*, yet such a child is not destitute of capacity. It possesses, in some degree, reason and judgment. It is capable of understanding what is said; it may be made subject to the will and direction of those having it in charge, and a mother may be assumed from natural love and affection vigilant in protecting it from harm.

It seems to me that the jury were justified in holding that the mother, under the circumstances detailed, had no reason to suspect that the child would go into the street, or that ordinary prudence would require any additional care to that which was actually exercised. The mother was absent from the actual presence of the child but a few brief moments. She had a right to presume that he would obey her direction, and go into the back yard, and this would be strengthened by the fact that he had never been in the street. True, the door might have been barricaded, but such an extraordinary measure would not be ordinarily necessary to keep the child from the street. It is not like the case supposed by counsel, of a dumb beast or lunatic. The child had reason, had always been tractable and quiet, and there is nothing to show that the mother had any reason to apprehend danger. From these facts the jury might find ordinary care. It is not improbable that the plaintiff was attracted by the children

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in the street, and suddenly escaped down the stairs. In the case of *Mangam v. The Brooklyn R. R. Co.* (38 N. Y., 455), a window was left open through which the child escaped into the street, and it was held a question of fact for the jury to determine whether proper care was exercised. Here the circumstances are quite as appropriate for the consideration of a jury. I think that the charge of the judge at the Circuit upon the question of negligence of both child and mother was strictly accurate, and the rulings upon the requests to charge were in conformity with the charge. As to the negligence of the defendant's driver, it is very clear that the evidence was sufficient to justify the finding of the jury. There was evidence tending to show that the child was struck by one of the horses in front; that the car was being driven at an unusual rate of speed, and that the driver was engaged in conversation with persons standing on the platform, and was not looking or giving any attention to his horses, or persons crossing the street. It is true there was a serious conflict upon these points, but they were questions for the jury, and the verdict is conclusive upon this court.

The case was fairly tried, and as I am unable to find any error of law committed upon the trial the judgment must be affirmed.

All concur.

Judgment affirmed.

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CHARLES A. HANKINS, Appellant, v. THE MAYOR, ALDERMEN  
AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

A board of county canvassers organized under the election laws of the State, although composed of town officers, do not meet as such, or to perform duties relating exclusively to town or county matters, but meet as a distinct board for a special service (MILLER and EARL, JJ., dissenting). The provision of the act of 1869, providing for the support of the government of the city of New York (chap. 875, Laws of 1869), which requires the mayor and comptroller to designate newspapers in which to publish the proceedings of the board of supervisors and proceedings relating to

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county affairs, does not include proceedings of the board of canvassers for the city and county of New York, and there is no repugnancy between that provision and the statutory regulations for the publication of the proceedings of election boards (§ 11, title 5, chap. 130, Laws of 1842). (MILLER and EARL, JJ., dissenting.)

Accordingly, *held* (MILLER and EARL, JJ., dissenting), that the power given to the boards of county canvassers to designate the papers in which the results of the elections shall be published, was not taken away from the board of canvassers of the city and county of New York by said provision of the act of 1869; and that other than the official papers having been designated, in 1870, by the board, the city corporation was liable for the expense of the publication.

(Argued December 10, 1875; decided January 25, 1876.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, affirming a judgment in favor of defendant, entered upon an order dismissing plaintiff's complaint on trial.

The complaint alleged in substance that the board of county canvassers for the city and county of New York, by a resolution of said board, passed May 30, 1870, designated the New York Official Railway News, a newspaper of which plaintiff was the proprietor, as a paper in which the results of an election held in said city and county May 17, 1870, should be published, and authorized the publication. That plaintiff, in pursuance of such authority, published the official statements and declaration of said board. That demand for payment of the reasonable price for such publication was made of the city comptroller, who refused to pay the same.

On the opening of the case on trial, defendant's counsel moved to dismiss the complaint, which motion was granted, and plaintiff's counsel duly excepted.

*John S. Lawrence* for the appellant. The election law and tax levy act can stand together. (Sedg. Const. Law [2d ed.], 97, 104; *Hayes v. Symonds*, 9 Barb., 260; *In re Evergreens*, 47 N. Y., 216; *Mongeon v. People*, 55 id., 613; *Crane v. Reeder*, 22 Mich., 322.) The canvassers are State officers. (Const., art. 10, § 3; 17 N. Y., 64, 67.) Plaintiff can recover under the provisions of chapter 375, Laws of 1872. (*People v. Green*, 63 Barb., 300.)

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*D. J. Dean* for the respondent. In order to recover plaintiff was bound to allege and prove that his paper was designated by the mayor and comptroller. (Laws 1863, chap. 227, p. 407; Laws 1865, chap. 646, p. 1326; 2 Laws 1867, chap. 586, p. 1597; *id.*, chap. 806, p. 1993; 2 Laws 1868, chap. 853, p. 2007; *id.*, chap. 854, p. 2025; 2 Laws 1869, chap. 865, p. 2113; 1 Laws 1870, chap. 383, p. 882; *In re Astor*, 50 N. Y., 366; *In re Smith*, 52 *id.*, 526; *In re Douglas*, 46 *id.*, 42.)

*Per Curiam*. The general laws of the State make provision for the election of county and State officers, including the canvass of the votes by the inspectors of election and the several boards of canvassers, the certifying the result and the publication by the boards of county canvassers of their determination. Boards of county canvassers are created and organized, not for a merely local purpose but to execute in part and in some of its details a general law of the State, in the due execution of which every part of the State and every citizen has an interest.

The board, although composed of town officers, supervisors and assessors, do not meet as such or to perform an official duty relating, exclusively, either to town or county matters. They organize not as a board of supervisors or assessors, but as a distinct board for a special service. They bear a name indicative of their duties, take the constitutional oath of office, choose one of their number chairman, the county clerk being *ex officio* secretary, and perform the statutory duty assigned them. By law they are required to cause a copy of their determination to be published in one or more of the newspapers of the county, with the statement upon which the determination was made. (1 R. S. [Edm. ed.], 133, *et seq.*; Laws of 1847, chap. 240.)

The county canvassers have the power to designate the papers in which the results of the elections shall be published and the number of papers in which the publication shall be made, and the expense is, with the other expenses of the

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election, made a county charge. (1 R. S., *supra*, 148, § 6.) This power has not been expressly taken from the boards of canvassers. Neither has the statute conferring it been in terms repealed, nor has the county of New York been by any statute excepted from its provisions. If by any means or by any legislation the county of New York is not within the operation of this general law, it is because by implication the legislature in making laws for the government of the county of New York have unmistakably manifested an intent to make that county an exception to the general law. The intent is sought to be spelled out from the peculiar clauses of the several tax levy acts passed for the support of the county government. The last act bearing upon the subject, prior to the rendering the service for which a recovery is claimed in this action, was passed in 1869. (Laws of 1869, chap. 875.)

Similar acts varying somewhat in phraseology had been passed annually for several years previously, but the act quoted being the last act upon the subject and covering the whole ground superseded prior laws and must be regarded as the only law in existence. That act merely appropriated, in making provision for the payment of county expenses, "for advertising, \$40,000;" and added, "the mayor and comptroller shall, from time to time, designate six daily newspapers and six weeklies, but no more, in which to publish the proceedings of the board of supervisors and all proceedings and notices relating to county affairs."

A repeal of statutes by implication is not favored, for very obvious reasons. Among others, the legislature may well be deemed competent to declare their whole intent in intelligible language, and therefore courts ought not to attribute an intent and give effect to a law beyond its terms, except upon the plainest manifestation of the intent of the law making power. Courts have adopted rigid rules upon the subject and they ought not to be departed from. It is not enough to justify the holding a statute repealed, by the mere passage of a subsequent statute upon the same or a cognate subject, that within the apparent policy of the later act the prior act

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might reasonably have been repealed, as within the reason of the legislation and fully to carry out the presumed intent of the legislature. Statutes are not adjudged to be repealed upon a conjecture of what the legislature would probably have done had their attention been called to the particular act claimed to have been superseded. The rule is, that a statute only operates as a repeal of a former one to the extent that the two are repugnant; if both can stand, and to the extent that they can stand and have effect, they will both have effect. (*People v. Palmer*, 52 N. Y., 83; *In re The Evergreens*, 47 id., 216; *Mongeon v. The People*, 55 id., 613.) There is no repugnancy between the statutes making provision for the support of the government of the county of New York and the provisions therein for designating the papers for the publication of proceedings of county officers and boards, and the statutory regulations concerning elections and the publication of the proceedings of election boards. They are not in conflict, but both, in the language of the cases, can stand and have full effect. Whatever might have been said in respect to some of the prior tax levy acts, more comprehensive and far reaching in their terms, the law governing this case (Laws of 1869, *supra*) comes far short of reaching the general statutes under which the plaintiff asserts his claim. There is no prohibition of the employment of other papers, or a forbidding to pay for publications in papers other than those selected in pursuance of the act; neither is the publication of the proceedings of the board of county canvassers among the services for which the mayor and comptroller have authority to select papers. The statement and determination for which the plaintiff seeks to recover were neither "proceedings of the board of supervisors, or proceedings relating to county affairs." "County affairs" are those relating to the county in its organic and corporate capacity, and included within its governmental or corporate powers. We would hardly expect to find the legislature putting it into the power of the city officers of New York to prevent the publication of proceedings so vitally affecting the whole

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State as do the canvass of the votes of that locality and the determination of the result, which public policy requires to be published in every other county under the direction of the proper board, or to leave it to the caprice of any outside officials, whether they should be published at all, or in what or what number of papers. The legislature should speak in no uncertain language before such effect should be given to their acts ; at least, it should not be left to conjecture, or to be spelled out.

The judgment should be reversed and a new trial granted, costs to abide the event.

MILLER, J. (dissenting). The plaintiff, as proprietor of a newspaper in the city of New York, claims to recover charges made for the publication of the official canvass of the board of canvassers of the city and county of New York, of the election held in said city on the 30th day of May, 1870, which was done in pursuance of a resolution of the board of canvassers. The right of the plaintiff to maintain the action rests entirely upon the provisions contained in 1 Revised Statutes (Edm. ed.), 134, section 11. It will be noticed that the board of canvassers for the city as well as the county directed the publication, and it is insisted that this enactment has been modified or repealed by subsequent legislation, by which no money can be paid for advertising in the city and county of New York, except for advertisements in newspapers authorized by the mayor and comptroller. Since 1863, and evidently for the purpose of restricting the expenses of printing advertisements for the city and county, annual provision has been made by the legislature for the appointment of newspapers for this purpose. Those which relate more particularly to the subject of this action are contained in the Laws of 1869 and 1870. By chapter 875, Session Laws 1869, section 1, the mayor and comptroller are required, from time to time, to designate six daily and six weekly newspapers, "but no more, in which to publish the proceedings of the board of supervisors and



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all proceedings and notices relating to county affairs." The canvass was a proceeding in reference to the election which had been held, and required a statement of the votes which had been taken and the number cast for the several candidates. It related to county affairs, and the publication of the same was evidently included within the meaning of the statute cited. By chapter 383, Session Laws of 1870, section 1, it was enacted that all advertisements for the city government shall be published in newspapers to be designated by the mayor and the comptroller, and the payment of "any money for advertising except to such newspapers" is prohibited. The canvass published was a statement of the determination of the board of city as well as county canvassers in relation to the election which had been held, and the publication was therefore an advertisement for both and made in direct conflict with the statute last cited. In each of the laws referred to, a specific amount is provided for the payment of such expenses, thus indicating that it was intended to embrace only sufficient to cover the number of newspapers designated; for an unlimited license to publish in any newspapers which a board of canvassers might select would increase the expense beyond any reasonable amount which might be provided when the newspapers were restricted. The design was to limit the expenditure for such purposes and to prevent the exercise of the power of both the city and county authorities, and other bodies, which had previously been authorized to direct the publication of advertisements to an unlimited extent. The provisions in question clearly embraced all advertising for the city and county and there is no valid ground for claiming that it was confined to local improvements or merely proceedings of the common council or the board of supervisors. Nor is there any reason for the contention that the fund provided for the payment of the demands for advertising was a special one and only for purposes of paying for printing other publications besides the canvass. Whether any designation of papers was made every year, under the provisions of the different acts, as



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required, is not material, as the general provisions in relation to the appointment of newspapers are not limited in their effect to the respective years in which they were enacted. (*Matter of Astor*, 50 N. Y., 366.) The provisions referred to are mandatory, and it is settled that publications cannot lawfully be made for city and county purposes in newspapers other than those designated. (*Matter of Astor*, *supra*; *Matter of Smith*, 52 N. Y., 526; *Matter of Douglass*, 46 id., 42.)

As the provisions cited are in conflict with the statute relied upon by the plaintiff, it necessarily follows that the first enactment must yield to the latter. It is a well settled rule that a subsequent statute which is clearly repugnant to a prior one necessarily repeals the former, although it does not do so in terms; and even if the subsequent statute be not repugnant in all its provisions to a prior one, yet if the latter statute was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the original act. The maxim *Leges posteriores priores contrarias abrogant* is applicable in such a case. (*Davies v. Fairbanks*, 3 How. [U. S.], 636; *Dexter and Limerick Plank-road Co. v. Allen*, 16 Barb., 15.) It is plain that the latter statutes were intended to provide a new rule for publication in the city and county of New York, and hence to that extent they repealed or modified the provision of the general law so far as that city was concerned. It is true, as is claimed by the learned counsel for the plaintiff, that a repeal by implication is not favored in the law, and when the latter statute can stand together with the former both will stand unless the former is repealed or the intent is manifest; but where it is entirely clear that the intention is to alter the law as is the case here and to limit its operation and effect, this rule has no application, and the doctrine may be invoked which has been repeatedly declared, that every statute is by implication a repeal of all prior statutes, so far as it is contrary and repugnant thereto, and that without any repealing clause. (*Commonwealth v. Kimball*, 21 Pick.,

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373.) See, also, *Rex v. Cator* (4 Burr., 2026). where the same intimation is given by Lord MANSFIELD. As the intent is clear that the general law should not control, the case presents an exception to the rule that general laws control local laws, and the true construction to be placed upon the local enactments cited and referred to is, that they were designed as a modification of the general statute, so far as it related to the city and county of New York.

There is no force in the position that the board of canvassers were State officers, and therefore are not within the provisions of local acts of legislation. They are in fact local officers, selected for local purposes, paid by the local authorities, and in no case exempted from the effect of the laws relating to the local government. The provisions of section 35, chapter 38, Session Laws of 1870, to the effect that all provisions of the election laws of the State are applicable to all elections in the city of New York, could not have been intended as a repeal or modification of the laws providing for the payment of printing done for the city or county, and relate merely to the conduct and proceedings in reference to the election, and not to the expenses of publishing the canvass.

With this limitation the law in question can have full force and effect. The plaintiff also claims that the right to compensation is established, if otherwise in doubt, by chapter 375, Session Laws of 1872. This act authorized the board of audit therein named to allow claims of similar character, notwithstanding the want of authority to publish, and directed the comptroller to pay the same. The difficulty is, in allowing the plaintiff the benefit of the law last cited, that it nowhere appears that the board of audit ever acted upon the plaintiff's claim, and had it done so a remedy could have been obtained by a mandamus to compel payment of the amount allowed. The repeal of acts in conflict with the act last cited, which constitutes a portion of it, has no effect upon the acts before referred to, providing for the selection of newspapers to publish advertisements. There is no valid ground

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upon which the plaintiff's claim can be upheld, and the case was properly disposed of in the court below.

The judgment should be affirmed, with costs.

For reversal, ALLEN, FOLGER, RAPALLO and ANDREWS, JJ.

For affirmance, MILLER and EARL, JJ.

CHURCH, Ch. J., did not vote.

Judgment reversed.

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WILLIAM WITBECK, Appellant, v. WILLIAM P. VAN RENSS-  
SELAER et al., Respondents.

A writ<sup>1</sup> of possession issued upon a judgment in ejectment can lawfully be executed after the return day thereof; the office of the writ is simply to carry into effect the judgment and the command to return within sixty days is directory merely.

Although it is the duty of the sheriff, in executing such writ, if required, to remove from the premises the personal property thereon, the omission to do so does not vitiate the execution of the writ when possession of the land is delivered.

Where the action was brought by a landlord because of non-payment of rent and possession is delivered to him or his assignee, the statute giving to the defendant six months after such taking possession in which to redeem (2 R. S., 506, § 83) begins to run, and the time limited for redemption is not enlarged by a subsequent re-entry of the tenant.

(Argued December 22, 1875; decided January 25, 1876.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, affirming a judgment in favor of defendant, entered upon a decision of the court dismissing plaintiff's complaint. (Reported below, 2 Hun, 55; 4 T. & C., 282.)

This action was brought by plaintiff as assignee of the lessee under one of the Van Rensselaer "manor leases," so called. The court found in substance as follows: Defendant Van Rensselaer obtained judgment against plaintiff in July, 1863, in an action of ejectment for the non-payment of rent, reserved in the

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lease. In 1864, Mr. Van Rensselaer assigned the judgment and all his rights and interests under the lease to Peter Cagger. On the 17th day of January, 1867, a writ of possession was issued upon said judgment to the sheriff of the county of Rensselaer, in which county the premises were situated, directing said sheriff to put the plaintiff in said action in possession, and to return the writ within sixty days from its receipt. That the sheriff made return of the due execution of the writ by delivering possession of the premises, on the tenth day of May, to the agent of said Cagger, then on the premises. That on said tenth day of May, the deputy sheriff having the writ, in company with said agent, went upon the premises, and in the absence of the defendant named in the writ (the plaintiff in this action), who did not reside on the premises, took from his hired man, one Carner, who worked the same and lived in a portion of the dwelling-house thereon, and who was the only person in apparent possession of said premises, a writing admitting a surrender thereof and acknowledging a holding as tenant at will of Cagger, after having first demanded possession and declared his intention of removing said Carner, unless he consented to deliver possession or to acknowledge a holding under the landlord. The deputy and the agent also went upon various portions and lots of said premises, and said deputy assumed to deliver possession to the agent, and levied upon certain of the personal property thereon to satisfy the costs. That nothing on the premises was, in fact, displaced or removed. That there was a considerable amount of personal property thereon belonging to the plaintiff herein. That said Carner continued to work for said plaintiff, upon said premises, under his previous employment, until April 1, 1868. That neither Van Rensselaer or Cagger, or any one on behalf of either of them, subsequently visited the farm, or exercised or attempted to exercise any dominion over it, unless proved by the possession of Carner, until July, 1869. when an alias writ was executed. On the 24th day of September, 1869, a tender was made of an amount alleged to be the rent in arrear, which was refused, but not on the ground that

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the amount was insufficient. No tender was made within six months after May 10, 1867.

The court found, as conclusions of law, that the tender would have been sufficient, had not the time for redeeming expired, but that having neglected to redeem within six months after May 10, 1867, plaintiff was barred and foreclosed of all relief.

*R. A. Parmenter* for the appellant. A levy not having been made within sixty days after the writ was issued, the old precept was dead and a new one should have been issued. (*Van Rensselaer v. Kidd*, 6 N. Y., 333; Code, §§ 285, 286, 289, 290; Crocker on Sheriffs, § 554; *Kingston Bk. v. Eltinge*, 40 N. Y., 391-394; Adams on Ejectment, 346.) The return indorsed on the writ was not conclusive on Witbeck. (*Browning v. Hanford*, 5 Den., 586-595; *Fitch v. Devlin*, 15 Barb., 47; Crocker on Sheriffs, §§ 43, 44, 45; *Watson v. Watson*, 6 Conn., 334; *Butts v. Francis*, 4 id., 424; *Van Rensselaer v. Chadwick*, 7 How. Pr., 297; *Baker v. McDuffie*, 23 Wend., 284; *Welsh v. Joy*, 13 Pick., 482.) Witbeck was not dispossessed by the sheriff May 10, 1867. (Herman on Executions, chap. 19, p. 529; *Hathaway v. Howell*, 54 N. Y., 113; 6 Mass., 23; 18 N. H., 217.)

*Samuel Hand* for the respondents. Plaintiff's right to redeem expired six months after May 10, 1867. (2 R. S., 506, §§ 33, 34.) The execution was fully executed. (Adams on Ejectment, 343; *Smith v. White*, 5 Dana [Ken.], 376-378; *Scott v. Richardson*, 2 B. M., 507.) There was no force in the objection that the levy was more than sixty days after the execution was issued. (*Hartwell v. Root*, 19 J. R., 345; *Jackson v. Shafer*, 11 id., 517; *Fetler v. Pelton*, 8 W. & S., 455; *Marsh v. Fancett*, 2 H. Blk., 582; 11 Viner's Abr., "Exn." [Q. A., 5]; *Withers v. Harris*, 7 Mod., 66, 69; *Countess of Warwick v. Ld. Barkley*, Noy., 71; 2 Sid. 156, note; *Wood v. Colvin*, 5 Hill, 228, 230; *Mordecai v. Speight*, 3 Dev. [N. C.], 428, 429; *Nolan v. Seekright*, 6 Mun. [Va.],

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185; *Patrick v. Johnson*, 3 Lev., 404.) The pretended irregularities of description in the writ of possession could not be taken advantage of here. (*Williams v. Hogeboom*, 8 Paige, 469; *Peck v. Tiffany*, 2 Comst., 451.)

*Per Curiam.* The time within which the plaintiff could redeem was limited by statute to six months after the taking of possession of the demised premises by the landlord under an execution issued upon the judgment in ejectment recovered by him. (2 R. S., p. 506, § 33.) The same statute provides, that in case the rent and costs remain unpaid for six months after the execution is executed, the lessee shall be barred of all relief in law or equity. (2 R. S., 506, § 34.) The judgment in ejectment was recovered in July, 1863. A writ of possession thereon was issued on the 17th of January, 1867, returnable sixty days thereafter. Before the return day, viz., on the 25th of February, 1867, a stay of proceedings was obtained and served by the tenant, and this stay continued in force until April 30, 1867, which was after the return day of the writ of possession. Whether any steps had been taken towards the enforcement of the writ, before the service of the stay of proceedings does not appear in the case. The return of the sheriff indorsed on the execution states that on the 10th of May, 1867, he delivered possession of the premises described in the execution to William P. Van Rensselaer, the plaintiff mentioned and described therein, in accordance with the commands of the execution. The tender of the rent in arrear was not made until September 24, 1869, and on the following day this action to redeem was commenced. It is obvious that if a writ of possession was executed on the 10th of May, 1867, the plaintiff's right to redeem had long been barred before his attempt to exercise it in September 1869. But the plaintiff insists that his right was not barred, and rests his claim upon two grounds. First. That the writ of possession having been issued on the 17th of January, 1867, and being returnable sixty days thereafter, the return day had elapsed before the 10th of May, 1867, the day upon which it

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is claimed to have been executed, and there could be no valid execution of the writ after the expiration of the return day. Second. That there was no actual execution of the writ on the 10th of May, 1867.

Upon the first point the learned counsel for the plaintiff has cited authorities to the effect, that after the return day of a *fi. fa.*, the power of the sheriff to levy on personal property is gone, and the plaintiff is put to a new execution if he wishes to pursue the defendant's property. (*Devoe v. Elliot*, 2 Caines, 243; *Vail v. Lewis*, 4 J. R., 456; *Van Rensselaer v. Kidd*, 6 N. Y., 333; *Kingston Bank v. Eltinge*, 40 id., 394.) But the only authority which he cites for the purpose of showing that this rule applies to a writ of possession is Adams on Ejectment, 346, note 1, where it is stated that the writ of *habere facias possessionem* cannot be executed after the return day. This note, however, is founded only upon a manuscript decision of the United States Circuit Court of Pennsylvania, cited in Coxe's Digest, page 273; and upon the case of *Dent v. Simmons* (7 J. J. Marsh. [Ky.], 42), in which no such point was adjudged, but only that where a writ of possession had been fully executed, and the plaintiff in ejectment put in possession and the writ returned executed, and the defendant in the execution afterwards re-entered, the proper remedy for restitution was by warrant for forcible entry, and that an order for an alias writ of possession was erroneous.

We are of the opinion that the conclusion of the Supreme Court upon this branch of the case was correct, and that the writ of possession could lawfully be executed after the return day. The judgment bound the land of which the writ directed possession to be delivered, and the office of the writ was simply to carry the judgment into effect with reference to that particular piece of land. Formerly such a writ usually had no return day. (Crocker on Sheriffs, § 575.) The plaintiff had the right to take possession of the land, by virtue of the judgment, without any writ, if he could peaceably do so. We think that in such a case the command to return the writ within sixty days is directory merely. Such an execution is



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not analogous to an execution against personal property, where a levy is necessary to subject it to the operation of the writ, but is more analogous to a proceeding to sell real estate under an execution, which may be had without any previous levy, and which the appellant's counsel concedes in his brief may be taken after the return day of the writ.

This brings us to the second point made by the appellant, viz., that the writ was not in fact executed on the 10th of May, 1867.

The judge found as a fact that the execution was duly executed on the 10th day of May, 1867, by the sheriff, who assumed to deliver possession of the premises in question to W. S. Church, the agent of the assignee of the plaintiff in the execution, he being then upon the said premises. We think that this finding is sustained by the return of the sheriff, and the other facts proved upon the trial and found by the judge. As to the only part of the premises which were occupied, the sheriff demanded possession of the occupant, and threatened to remove him unless he consented to acknowledge himself as holding under the landlord, which he did in writing. As to the unoccupied portions of the farm, the sheriff went upon them, and assumed to deliver possession to said agent, Church, who was thus, for the time being, placed in actual possession of the farm, so far as possession thereof could be delivered. Although it was the duty of the sheriff, if required, to remove from the premises the personal property thereon, yet there is no authority cited showing that the omission to do so vitiates the execution of the writ, when possession of the land is delivered.

What transpired after such execution of the writ is not material to the present case. If possession of the farm was delivered to the plaintiff or his assignee, by virtue of the writ, the statute began to run from that time, and the time limited for redemption could not be enlarged by the subsequent re-entry of the appellant.

Both parties appear to have rested upon their strict legal rights. The time for redemption being limited by statute,



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and having expired, and the statute declaring all relief at law or in equity to be barred, the court had no discretion in the matter, and was bound, upon the facts proved, to dismiss the complaint.

The judgment must be affirmed.

All concur; MILLER, J., not sitting.

Judgment affirmed.

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MARIA LOUISE CLARK, Respondent, v. THE NEW YORK LIFE  
INSURANCE AND TRUST COMPANY et al., Appellants.

K. and M. and wife entered into a contract which, after reciting that the parties were the owners of divers lots of land on either side of Twenty-second street, between Fourth avenue and Broadway, in the city of New York; that dwelling-houses had been erected on each side of said street, with a court-yard seven and a-half feet in front, and that the parties deemed it for their mutual advantage that the "lots *fronting on said street*" should be occupied exclusively by dwelling-houses, the fronts of which should be placed seven and a-half feet back from the line of the street, contained an agreement that so much of their respective lots as were contained between the line of the street and a line seven and a-half feet therefrom should "remain and be enjoyed as a court-yard in front of any houses to be erected on said lots." The parties, at the time of making the agreement, had before them a map made several years before, by which the lots on Broadway and Fourth avenue were laid out twenty-five feet wide and ninety-six feet deep, while the intermediate lots were twenty-five feet on Twenty-second street and ninety-six feet deep. In an action brought by plaintiff, who subsequently purchased one of the lots on Twenty-second street to restrain defendant from building on a corner lot on Broadway up to the line of Twenty-second street, *held*, that it was to be assumed that the parties, in making the contract, had in contemplation the lots as laid out and designated on the map; that the corner lots fronted respectively on Broadway and Fourth avenue, and it was only the intermediate lots which fronted on Twenty-second street within the meaning of the contract; and that, therefore, the lot in question was not included in said provision of the contract, and defendants could not be restrained from building thereon up to the line of Twenty-second street.

*Clark v. N. Y. L. I. and T. Co.* (7 Lans., 322) reversed.

(Argued January 17, 1876; decided January 25, 1876.)

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Statement of case.

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APPEAL from a judgment of the General Term of the Supreme Court in the first judicial department modifying a judgment entered upon a decision of the court at Special Term. (Reported below, 7 Lans., 322.)

This action was brought to restrain defendants from building upon a strip of land lying along the southerly line of Twenty-second street, in the city of New York, seven feet six inches in width on Broadway, and 122 feet two and one-half inches on Twenty-second street.

On the 12th May, 1849, Philip Kearney of the one part, and Alexander Macomb and wife of the other, who were owners of land on Twenty-second street and Fourth avenue, entered into a contract of which the material portions are as follows :

“Whereas, The said party of the first part is the owner of divers lots of land in the Eighteenth ward of the city of New York, on the northerly side of Twenty-second street, between the Fourth avenue and Broadway; and whereas, the said parties of the second part, in right of the said Susan, are the owners of the divers other lots of land on the southerly side of said Twenty-second street, between the said Fourth avenue and Broadway; and whereas, divers dwelling-houses of brick or stone have been erected on each side of said street, which have been set back seven feet and six inches from the line of the street, thus leaving a court-yard in front of said houses seven feet and six inches between the said houses and the line of the street; and the parties hereto deeming it to be for their mutual advantage that the lots fronting said street, when built upon between the said Fourth avenue and Broadway, should be occupied exclusively by dwelling-houses, and that the fronts of all such dwelling-houses should be placed back seven feet and six inches from the line of the street so as to range with those already built of brick or stone, and that no nuisance should be permitted on said lots between the Fourth avenue and Broadway aforesaid, do, for themselves and their respective heirs and assigns, grant and agree to and with each other that so much of their said respective lots

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Statement of case.

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belonging to them respectively, as is contained between the line of the street and a line seven feet and six inches therefrom, shall forever hereafter remain and be enjoyed as a courtyard in front of any houses to be erected on said lots."

The court found that prior to the time of the execution of the agreement a map had been made of the two half blocks bounded by Broadway and Fourth avenue, with Twenty-second street running between. This map, or a transcript therefrom, was before the parties when the agreement was made. Upon the map the south-east corner of Broadway and Twenty-second street was divided into six tier of lots, the corner one of which was twenty-five feet and three-fourths of an inch on Broadway and ninety-six feet one inch on Twenty-second street. Three others were about twenty-five feet on Broadway and running back to the line of the corner lot. The lots on Twenty-second street were laid out twenty-five feet wide on that street and running back about ninety-six feet.

Macomb and wife, subsequent to the execution of the contract, conveyed to Uriah F. Carpenter one of the lots situate on the southerly side of Twenty-second street, one hundred and twenty-two feet two and one-half inches from Broadway. Carpenter erected a dwelling-house thereon conforming to the restriction contained in the agreement, which lot is now owned by plaintiff. Mrs. Macomb died seized of the lots between plaintiff's and Broadway. The fee at the time of the commencement of this action was vested in defendant, The New York Life Insurance and Trust Company, in trust for the other defendants, the children of Mr. and Mrs. Macomb, Mr. Macomb having an estate for life as tenant by the curtesy. In 1868 said company, as trustee, and Mr. Macomb executed a lease of the four lots on Broadway and the adjoining lot on Twenty-second street to defendant James Purssell, who had commenced to erect buildings thereon. At the time plaintiff purchased, the corner on Broadway was occupied by buildings in a single plot which were set back from the southerly line

of Twenty-second street seven feet six inches. Further facts appear in the opinion.

The court held, as conclusion of law, that the corner lot was not included in or controlled by the provisions of the agreement, but that the lot leased to Purssell between the corner lot, as laid out on the map, and plaintiff's, was, and directed judgment restraining defendants, their agents, etc., from building on that portion thereof lying between the line of Twenty-second street and a line seven feet six inches southerly therefrom.

The General Term held that the contract embraced the corner lot, and modified the judgment by extending the injunction so as to include that portion thereof north of a line seven and one-half feet south of Twenty-second street.

*Lyman Tremain* for the appellants. It was proper to resort to extrinsic facts to ascertain to what lots the agreement referred. (57 N. Y., 668; 13 id., 569; 1 Gray, 138; 9 Alb. L. J., 117, 281.) The positive testimony of Macomb, that the agreement was made with reference to the map, could not be arbitrarily rejected. (45 N. Y., 549; 46 id., 683; 25 id., 363; 6 N. Y. S. C., 366.) Purssell was entitled to protection as a subsequent grantee without notice. (*Cole v. Hughes*, 54 N. Y., 444.) This was not a proper case for an injunction. (*Olmstead v. Loomis*, 6 Barb., 152; Will. Eq., 342; 3 Blk. Com., 221, 222.)

*W. A. Beach* for the respondent. The covenant of the contract was obligatory upon the assigns of both parties having actual or constructive notice. (*Tallmadge v. E. R. Bk.*, 26 N. Y., 105; *Birdsall v. Fiedler*, 12 How., 551; *Barrow v. Richard*, 8 Paige, 351; *At. Dock Co. v. Leavitt*, 50 Barb., 135.)

CHURCH, Ch. J. The rights of the parties in this action depend upon the construction to be given to the agreement of the 12th of May, 1849, between Philip Kearney and

Alexander S. Macomb and wife. The learned judges, at Special and General Term, delivered opinions, and materially differed as to the proper construction to be given to the contract. The parties were respective owners of a large number of lots on each side of Twenty-second street in the city of New York; and the purpose of the agreement was to reserve seven feet and six inches in front of the houses on each side from being built upon, and the contention is, whether this restriction was intended to apply to the corner lot facing Broadway, the action being to restrain building upon that lot within the distance of seven feet and a-half on Twenty-second street. From the disagreement between the learned judges below, it would be inferred that the question is not free from difficulty. To determine which construction should be adopted requires a careful analysis of the language, together with a due regard to the effect of surrounding circumstances. The preamble recites that the parties are respectively the owners of divers lots of land on either side of Twenty-second street, between Fourth avenue and Broadway; that divers dwelling-houses, of brick or stone, have been erected on each side of said street, leaving a court-yard seven and a-half feet in front of said houses, and then proceeds as follows: "And the parties hereto deeming it to be for their mutual advantage that the *lots fronting said street*, when built upon between Fourth avenue and Broadway, should be occupied exclusively by dwelling-houses, and that the fronts of all such dwelling-houses should be placed back seven feet and six inches from the line of the street \* \* \* do, for themselves and their respective heirs and assigns, grant and agree to and with each other that so much of their respective lots, belonging to them respectively, as is contained between the line of the street and a line seven feet and six inches therefrom shall forever hereafter remain and be enjoyed as a court-yard in front of any houses to be erected on said lots," etc.

The contract assumes that the vacant land upon the street had been divided into lots, although many of the lots had not

been built upon, and were not distinguishable by visible monuments. It is manifest also, I think, from the language employed, that the parties intended to reserve the seven and a-half feet only from the lots fronting on Twenty-second street. It expressly recites that they deem it to their advantage that the lots fronting on the street should be exclusively occupied by dwelling-houses, the fronts of which should be placed back seven and a-half feet from the line of the street, and the agreement follows, that seven and a-half feet shall remain as a court-yard *in front of any houses* to be erected on said lots. This language refers to houses to be built on lots fronting on the street, and contemplated that those houses would be dwelling-houses, although the restriction would probably apply to any other house built on a lot fronting on the street. The question becomes material, therefore, to determine what lots fronted on Twenty-second street, or, rather, to determine whether the lot on the corner of Broadway did so front within the true meaning of this contract. As before stated, the contract assumes that the land had been divided into lots, and it must be presumed that the parties knew what the division was. Besides, the fact of the division into lots was proved; and it was proved also that, several years prior to making the agreement in question, a map had been made and filed in the register's office; and it was also proved that at the time of the making of the agreement the parties had this map, or a transcript thereof, before them. According to this map, lots on Broadway were laid out twenty-five feet wide, and running back about ninety-six feet, and they were laid out in the same manner on Fourth avenue at the other end of the block, while between these lots the lots were laid out the other way, twenty-five feet on Twenty-second street, and running back half of the width of the block, which was about ninety-six feet. The question in every contract is to determine what the parties intended, and if the language is clear and unambiguous, that is to control; but it is generally competent, and often indispensable, to refer to the subject-matter and other circumstances, and

to consider what the parties saw and knew in order to ascertain their meaning. The map was therefore competent if it throws light upon what the parties intended by lots fronting on Twenty-second street.

It was argued by the learned counsel for the plaintiff, that the corner lot being twenty-five feet on Broadway and extending back along Twenty-second street ninety-six feet, fronted as well on Twenty-second street as on Broadway. In some sense this is true, inasmuch as it is accessible to the street and adjoins it, but I cannot concur in this view in the sense in which it should be construed in this contract. Language is to be construed according to its ordinary meaning, and not in a technical or artificial sense. According to the general understanding, as well of those conversant with the business of real estate as others, the lots laid out twenty-five feet on Broadway would be regarded as fronting on that street, and so on Fourth avenue, and the lots between those tiers of lots running the other way, would be deemed to front on Twenty-second street, and it must be presumed that the parties so regarded them, and that when they specified lots fronting on Twenty-second street, they intended to distinguish between those and other lots fronting on other streets. It matters not that it is possible to make a front to a building on Twenty-second street, which may be erected on the corner lot. Such would not be usual even if practicable, but this would not change the fact that the *lot* fronts on Broadway, and the question is which way the lot fronts as understood by the parties. Nor do I regard it important that, at the time the contract was made, the lots on Broadway were not built upon nor designated by any visible monuments. It must be assumed that the parties had in contemplation the lots as laid out and designated on the map. It is inferable also, I think, from the contract, that the parties contemplated that the tiers of lots on Broadway and Fourth avenue would or might be occupied for business purposes, but whether this was so or not, it is a circumstance entitled to some weight against the construction claimed by the plain-

tiff, that to reduce the corner lot seven and a-half feet, which would leave it only seventeen and a-half feet wide, would very seriously impair its value, either for business or other purposes, while a court-yard in front of dwelling-houses from the end of the lots ninety-six feet deep would not diminish the value, and if uniformly observed through the street might increase it. It would, doubtless, be desirable to the owners of dwellings on the street to have the open space through to Broadway, but the parties who made the arrangement were the owners of the lots on Broadway and Fourth avenue as well as the others, and they would naturally regard the interests connected with those lots as much as the others. The question of the extent of the covenants against nuisances is not before us, and whether that extends to the Broadway lots need not be considered.

From the best examination I have been able to make, I feel constrained to agree with the Special Term, that the agreement did not include the lot on the corner of Broadway and Twenty-second street, extending back ninety-six feet. It is sought seriously to interfere with the right of property in that lot, and to justify such interference requires something more than a doubtful right. If the true construction of the contract is doubtful, as perhaps it should be regarded, the plaintiff must fail. A reasonably clear case should be made before the rights of an owner of property should be impaired to the extent claimed. As to the lot east of the corner lot, the injunction was properly granted.

The judgment of the General Term modifying the judgment of the Special Term must be reversed, and the judgment of the Special term affirmed.

All concur; RAPALLO, J., not sitting.

Judgment reversed.



## Statement of case.

SAMUEL L. M. BARLOW et al., Respondents, v. MARIA J. MYERS, Appellant.

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| 112 | 26  |
| 64  | 41  |
| 130 | 522 |
| 64  | 41  |
| 180 | 270 |

A promise made by one person for a valuable consideration, paid by another, to pay the debts of the latter, is in legal effect a promise to pay creditors who are such at the time the promise is made. They acquire thereby additional security for the payment of their debts, which will pass as an incident on assignment of one of the debts secured, but the assignee takes it by a derivative title from the assignor, and no direct contract is created by the assignment between him and the promisor.

It is immaterial that the debts are upon negotiable instruments not due. In the absence of special words indicating such an intent, the promise is not to the persons holding the instruments at their maturity; and the interest of the assignee in the promise is subject to any equities on the part of the promisor existing against the debt while in the hands of the assignor.

Where, therefore, defendant, in consideration of the transfer to her of the property of the firm of R. & W., promised to pay the debts of the firm, among which were certain promissory notes not due, then held by N. R., who before maturity assigned them to plaintiff, in an action upon the promise, *held*, that defendant could set off a claim held by her against N. R.

*Barlow v. Myers* (3 Hun, 720) reversed.

(Argued January 17, 1876; decided January 25, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of plaintiffs, entered upon the report of a referee. (Reported below, 3 Hun, 720; 6 T. & C., 183.)

This action was brought by plaintiffs as holders of three promissory notes made by the firm of Randall & Williams, upon a promise made by defendant to said firm, upon assignment to her of the property and assets of the firm, and as part consideration for the assignment to pay the debts of the firm.

The three promissory notes, at the time of the sale and agreement, were held by Nathan Randall, and were not then due. Randall transferred them before maturity to plaintiffs. Defendant at the time held a note against Randall. This she

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set up in her answer and offered to prove as a set-off, but the referee rejected the evidence.

*D. Pratt* for the appellant. Plaintiffs could not maintain this action on the contract. (47 N. Y., 233, 242; Add. on Con., 940; 2 R. S., 191; *Curtis v. Tyler*, 9 Paige, 432; *Halsey v. Reed*, id., 446; *Etna Nat. Bk. v. Fourth Nat. Bk.*, 46 N. Y., 82; *Kelly v. Roberts*, 40 id., 432; *Merrill v. Green*, 55 id., 270.) The contract was only made with those who were creditors of the firm at the time of making it. (*McLaren v. Watson*, 19 Wend., 557; 26 id., 425; *Lamanreux v. Hewitt*, 5 id., 307; *Miller v. Gascon*, 2 Hill, 188; *Brown v. Curtis*, 2 Com., 225.) The note held by defendant against Randall was a proper subject of set-off. (2 R. S., 354; Code, § 111.) The rule that partnership property is primarily liable for the partnership debts is not applicable here. (6 Ves., 119; 32 N. Y., 65; 52 id., 146, 159; *Manhat. Co. v. Reynolds*, 2 Hill, 140; *Cruser v. Armstrong*, 3 J. Cas., 5.)

*Jos. Larocque* for the respondents. An action lies upon a promise made for a valid consideration to a third person for the plaintiff's benefit, although the latter was not privy to the consideration. (*Schermerhorn v. Vanderheyden*, 1 J. R., 140; *Cleveland v. Farley*, 9 Cow., 639; *Barker v. Bucklin*, 2 Den., 45; *D. and H. C. Co. v. West. Bk.*, 4 id., 97; *Lawrence v. Fox*, 20 N. Y., 268; *Burr v. Beers*, 24 id., 178; *Ricard v. Sanderson*, 41 id., 179; *Freeman v. Auld*, 44 id., 55; *Hutchings v. Minor*, 46 id., 456, 460; *Garnsey v. Rogers*, 47 id., 178; *Cooley v. Howe M. Co.*, 53 id., 620; *Thorp v. Keokuk Coal Co.*, 48 id., 253; *Claflin v. Ostrom*, 54 id., 581.) The contract, though made by defendant nominally as executrix, was in the eye of the law her own personal contract. (*Austin v. Monro*, 47 N. Y., 363; *Ferrin v. Myrick*, 41 id., 315; *Reynolds v. Reynolds*, 3 Wend., 244; *Dermott v. Field*, 7 Cow., 58; *Myer v. Cole*, 12 J. R., 349.) The note against Randall was not a proper set-off. (*Merritt v. Seaman*, 2 Seld., 168; *Dale v. Cook*, 4 J. Ch., 13; *Ship-*

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Opinion of the Court, per ANDREWS, J.

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*man v. Thompson*, Willis, 103; *Negetmeyer v. Lumbey*, id., 264, note; *Duncan v. Lyon*, 3 J. Ch., 359; *Root v. Tayler*, 20 J. R., 137.)

ANDREWS, J. The construction of the contract between Randall & Williams and the defendant most favorable to the plaintiffs, is to regard it as an undertaking by the defendant in consideration of an absolute and irrevocable sale to her of the property and assets of Randall & Williams, to pay as part of the purchase-price the debts owing by the firm, including the notes then held by Nathan Randall.

It is claimed by the defendant that the reservation to Randall & Williams of the right to repurchase the property and business, and the limitation of the defendant's undertaking, to the payment of debts to the amount of \$22,000, indicates that the contract was intended as a special agreement between the parties who executed it, and that the defendant did not intend to enter into any contract obligation, with or for the benefit primarily of the creditors of the firm. In the view we take of the case we deem it unnecessary to consider this position, but shall regard the promise of the defendant to pay the debts of Randall & Williams as absolute and as disconnected with any right in the vendors of repurchase or redemption.

In *Lawrence v. Fox* (20 N. Y., 268), the principle was asserted and maintained by the decision of the court that an action lies upon a promise made for a valid consideration to a third person for the plaintiff's benefit, although the plaintiff was not privy to the consideration, and was not named as promisee, and was not cognizant of the promise when made. The decision was made by a divided court; but in *Burr v. Beers* (24 id., 178), the court unanimously reaffirmed the doctrine of *Lawrence v. Fox*, without discussion, on the ground of *stare decisis*, and it must be regarded as the settled law of the State. Subsequent cases which were claimed to fall within the case of *Lawrence v. Fox*, have been distinguished from it, and while the courts have been disinclined

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to extend the doctrine of that case it has not been overruled, and it remains as the rule of decision in cases within the principle there decided. (*Ricard v. Sanderson*, 41 N. Y., 179; *Freeman v. Auld*, 44 id., 55; *Hutchings v. Miner*, 46 id., 456; *Garnsey v. Rogers*, 47 id., 233; *The Aetna Nat. Bank v. The Fourth Nat. Bank*, 46 id., 82.)

In this case the promise upon which the action is brought was generally to pay the debts of Randall & Williams, without specification of the particular debts, or naming the creditors of the firm, and in this respect it differs from all the cases to which our attention has been called where, in the absence of any trust, an action of this character by a creditor, or the person for whose benefit the promise was made has been maintained. But, assuming that this circumstance does not prevent the application to this case of the principle of *Lawrence v. Fox*, the question remains, for whose benefit was the promise made, and who are the persons other than the firm of Randall & Williams who are to be regarded as the promisees. The firm were the only promisees named in the contract, but the theory upon which third persons are allowed to maintain an action on such a promise is, as I understand, that the promise, in legal effect, is a promise to pay to the creditors, who are such at the time the promise is made, the debts owing to them by the person from whom the consideration moves. The debtor's obligation is to them alone, and they acquire through the promise additional security for the payment of their debts. This security will pass on an assignment of the debt to the assignee as an incident, and he may enforce it. (*Jackson v. Blodget*, 5 Cow., 202; *Pattison v. Hull*, 9 id., 747; *Langdon v. Buel*, 9 Wend., 80; *Craig v. Parkis*, 40 N. Y., 181.) But the assignee takes it by a derivative title from the assignor, and no direct contract is created by the assignment of the debt between him and the promisor.

The plaintiffs were not creditors of Randall & Williams when the contract between that firm and the defendant was made. The notes of Randall & Williams, now held by them,

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Opinion of the Court, per ANDREWS, J.

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then belonged to Nathan Randall. He acquired, upon the execution of the contract between Randall & Williams and the defendant, an interest in the contract, and was entitled to enforce it for his security. He could not, perhaps, have brought an action upon it until the note had matured, but the right in him to the security in the nature of a guaranty was perfect, as soon as the contract was made. He was the person for whose benefit, in part, the promise of the defendant was made, and not the plaintiffs, who then had no interest in the notes, and no debt against Randall & Williams. It is claimed that in legal intendment the promise was to such persons as should be the holders of the notes at their maturity, but there is nothing to show that this was the intention of the parties to the contract. They could not know that the notee would be transferred, and it does not in any way appear that it was any part of the object of the transaction to give them additional currency or credit.

The contract, if construed as claimed by the plaintiffs, would constitute the defendant the immediate promisor, not only of Nathan Randall, but of all the persons through whose hands the note might pass before maturity. It is an immaterial circumstance in determining the question to whom the promise was made, that the debts of Randall & Williams were upon negotiable instruments. A guaranty of a note or bill contained in the separate instrument is not negotiable because the paper guaranteed has that quality. (*Watson v. McLaren*, 19 Wend., 557; S. C., 26 id., 425.) So if a mortgage should be given to secure negotiable paper, the mortgage would not be negotiable, although it would pass to the indorsee of the paper as incident to the debt, and a transfer by a party to whom a personal covenant is made, of his interest therein, does not make the person receiving it the covenantee.

The negotiability of promissory notes and bills of exchange is an exception in the general law of contracts, and the right of a transferee for value before maturity of choses in action to hold them freed from the equities existing against them in

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Opinion of the Court, per ANDREWS, J.

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the hands of a prior holder attaches only to negotiable instruments.

It would be a great extension of the doctrine of *Lawrence v. Fox*, to hold that a promise to a debtor to pay his debt was a direct undertaking of the promisor with each of the persons successively who should acquire the interest of the original creditor, and this construction is not justified when there are no special words indicating that intention. The plaintiffs therefore as to the promise upon which the action is brought, stand in the place of Nathan Randall, and in the position of his assignees.

Before the Code, the action could only have been brought in his name, and the right of set-off would attach in favor of the defendant in respect of any debt or claim against him held by her at the time of the commencement of the action, which within the statute was the subject of set-off. (2 R. S., 354, § 17.) The action under the Code was properly brought in the name of the plaintiffs, but the right of set-off as it before existed, is not affected by the change in the form of the action. (Code, §§ 111, 112.) The note of Nathan Randall, held by the defendant when the action was commenced, was a proper set-off, unless she held it as executrix, and not in her own right. The defendant offered the note, with the indorsement of the payee, in evidence, as a set-off or counter-claim. The referee refused to receive the note in evidence, on a construction of the contract in question which precluded any set-off of a claim in her favor against Nathan Randall. The production of the note was *prima facie* evidence of her title to it, and if the question had been raised that she held it as executor only, she might have given further evidence on the subject. That point cannot now be taken.

The judgment of the General Term should be reversed and a new trial granted.

All concur; except RAPALLO, J., not voting.

Judgment reversed.

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Statement of case.

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SAMUEL SCHIFFER, Appellant, v. THOMAS PRUDEN, Respondent.

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Under the provisions of the Revised Statutes (2 R. S., 146, § 48), declaring that a wife convicted of adultery in an action brought against her by her husband for divorce, shall not be entitled to dower in his real estate, it is only where, upon proof and a finding or verdict of adultery, the court has, in such an action, given judgment of divorce against the wife and dissolved the marriage contract that her right of dower is lost; the forfeiture is not a consequence of the offence, but of the judgment founded thereon.

Where, therefore, in an action of divorce *a vinculo* brought by a husband against his wife, the referee found the wife guilty of the adultery charged, but also found the husband guilty of the same offence, and thereupon a judgment was entered dismissing the complaint, *held*, that the wife had not lost her right of dower; that this possibility of dower affected the title to lands deeded by the husband, she not having joined in the deed or in any manner relinquished her right; and that a vendee who had contracted to purchase and pay for the premises upon delivery of a deed assuring to him the fee, clear of all incumbrances, was not required to accept such title.

(Argued January 17, 1876; decided January 25, 1876.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York in favor of defendant, entered upon a case submitted under section 372 of the Code. (Reported below, 7 J. & S., 167.)

The facts as stated, were, in substance, these. In October, 1872, the parties entered into a contract by which plaintiff agreed to sell certain premises in New York city to defendant, and to convey, in October, 1874, by warranty deed with full covenants, conveying and assuring to defendant the fee simple, free of all incumbrances. Defendant upon delivery of said deed agreed to pay the purchase-price. The premises in question were conveyed to plaintiff by one Dietz, by deed dated May 1, 1872. Dietz was at that time the owner in fee of the premises; he was a married man; his wife did not join in the deed and is still living, and has executed no release or conveyance of her inchoate right of dower. In March, 1873, Dietz commenced an action against his wife for

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divorce on the ground of adultery. She appeared and answered setting up counter-allegations of adultery on the part of her husband. The issues were referred and the referee found the charges in both complaint and answer to be true and that neither party was entitled to a divorce, and thereupon a judgment was entered dismissing the complaint. At the time and place specified in the contract plaintiff tendered to defendant a warranty deed of the premises, with the usual full covenants, and demanded the purchase-price. Defendant refused to accept the deed, claiming the title to be defective in that it was subject to the inchoate dower right of Mrs. Deitz.

*Charles Jones* for the appellant. The premises were not incumbered by an inchoate right of dower of Mrs. Dietz, the wife of plaintiff's grantor. (2 R. S., 146, § 48; 3 R. S. [5th ed.], 237, § 61.) The subject of dower, so far as it has not vested, is entirely under the control of the legislature. (*Moore v. Mayor, etc.*, 8 N. Y., 110.) To deprive Mrs. Dietz of her right of dower, she having been found guilty of adultery a judgment of divorce was not necessary. (3 R. S. [5th ed.], 32, § 8; *id.*, 235, § 51; 2 R. S., 146, § 43; 1 Roper on Husband and Wife, 331; 4 Kent's Com., 50; *Wait v. Wait*, 4 N. Y., 95; *Hethrington v. Graham*, 6 Bing., 135; *Reynolds v. Reynolds*, 24 Wend., 193; 2 Coke's Inst., 435; *Coot v. Berty*, 12 Mod., 232.)

*J. Edgar* for the respondent. The adultery of Mrs. Dietz did not work a forfeiture of dower, it not having been followed by a decree of divorce *a vinculo*. (2 R. S. [3d ed.], 27, § 8; *id.*, 205, § 47; 2 *id.*, 204, § 41; 2 R. L., 199, § 8 [Revisers' Notes, 1st ed.]; 3 R. S., 597, § 8; 2 Scribner on Dower, 502; *Reynolds v. Reynolds*, 24 Wend., 193, 196-197; *Wait v. Wait*, 4 N. Y., 95, 102; *Cooper v. Whitney*, 4 Hill, 99; *Pitts v. Pitts*, 52 N. Y., 593.)

FOLGER, J. In effect, the plaintiff here asks the judgment of the court, that the defendant perform his contract for the



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purchase of certain lands, by paying the consideration-money agreed upon and taking a deed from the plaintiff. The defendant objects that the plaintiff is not able to give a good title; and it appears that Dietz, the immediate grantor of the plaintiff, had at the time of his conveyance to the plaintiff, and still has, a wife living. She did not join in the deed to the plaintiff, made by her husband, nor has she in any way, at any time, released any interest or right which she ever had in the premises. As his wife, married to him before the execution of the deed by him to the plaintiff, and while he was seized of an inheritance in the lands, she is *prima facie*, if she survives him and becomes his widow, entitled to dower in the lands. (1 R. S., 740, § 1.) In answer to this *prima facie* show of right in her, the plaintiff insists, that in an action for a divorce *a vinculo* from her, on account of her adultery, formerly brought by Dietz, her husband, it was found by the referee that she had committed adultery, as alleged in the complaint. It further appears, however, that in the same action the referee also found, that Dietz had committed adultery, and hence a judgment of divorce between them was denied, and there was judgment that his complaint be dismissed.

In that part of the Revised Statutes which treats of dower, it is enacted that in case of divorce, dissolving the marriage contract for the misconduct of the wife, she shall not be endowed. (1 R. S., 741, § 8.) The misconduct there spoken of must be her adultery, for there is no other cause for a divorce, dissolving the marriage contract. (2 R. S., p. 144; see *Reynolds v. Reynolds*, 24 Wend., 193.) This does not aid the plaintiff, for, as we have seen, there was no judgment of divorce granted to Dietz, and hence no divorce dissolving the marriage contract with his wife. The plaintiff invoked another section of the Revised Statutes, which is in these words: "A wife being a defendant in a suit for divorce brought by her husband, and convicted of adultery, shall not be entitled to dower in her husband's real estate, or any part thereof. \* \* \*" (2 R. S., 146, § 48.) He con-

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Opinion of the Court, per FOLGER, J.

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tends that the finding of fact of the referee above mentioned, is a conviction of her of adultery, and that she is thereby barred of, or has lost, her right to be endowed in these lands. He has argued as though any conviction in any action, that is (as he interprets the word conviction) any finding of fact, or any verdict that a wife has been guilty of adultery, will take from her her title to dower.

It is to be observed, however, that even upon that interpretation the section cited has not all that scope. It must be a suit for divorce, and it must be a suit for divorce in which she is defendant. So that if she should, as plaintiff, bring suit against her husband for divorce for his adultery, if he, on the hearing, should make proof of her adultery and she be found guilty thereof, and thus bar her action for divorce, this section would not apply. We cannot agree that the word *conviction*, in the place in which it is found, means only the establishing her adultery as a fact, by proof. We think that it is charged with the fuller meaning that, upon the proof and finding or verdict of her adultery, the court has given judgment of divorce against her, and dissolved the marriage between her and the husband. Dower is the adjunct of marriage and survivorship; and by the statute, as well as by the common law, every wife becoming a widow shall be endowed. It does not seem, when the statutes on dower and divorce are read together, that the legislature meant to take away from her the right of dower as a punishment for her adultery, and at the same time leave her a wife, and thus entitled to rights and relations of much greater significance and value. And it is here to be observed of the former statutes of England (13 Edw. I, chap. 34), and of this State (2 Greenl., Laws of N. Y., p. 274, § 7; 1 Rev. Laws 1813, p. 58, § 8), cited by the plaintiff, by which the adulterous wife was barred of her dower, that they included in the offence, the willingly leaving her husband and going away from him and continuing with her adulterer; thus contemplating as part of the offence which was to work that punishment, the notorious and continued breaking of the vows, and the practical breaking of

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the bonds, of matrimony. And force is added to this notion, when it is found that notwithstanding the elopement and adultery, if there was a voluntary reconciliation on the part of the husband and wife, she was still entitled to dower (2 Inst., 435); for, as it is there said, the cause of the bar of dower is not the manner of the going away, but the remaining with the adulterer in avoutry without reconciliation. It is to have weight, too, that the section relied upon was not passed with the primary object of affecting dower. It is found in a part of the Revised Statutes touching the domestic relations. The article which contains it is headed thus: "Of divorces dissolving the marriage contract." The main purpose of the enactment is to declare the cause for which, and the manner in which, a judgment of a court may be got decreeing a divorce and a dissolution of the marriage contract. When this has been provided for, the enactment then proceeds naturally, to set forth the consequences of that judgment, one of which is the loss of dower by the guilty wife when a defendant. But the spirit of the enactment is, that it is a consequence of the judgment, which is founded upon the fact of the offence, and not a consequence of the offence without a judgment thereupon. Such we consider was the intent of the section. We are helped to this conclusion by the next section, the forty-ninth (2 R. S., 146, § 49), which declares that, when a marriage is dissolved pursuant to the article, the complainant may marry again during the lifetime of the defendant; but no defendant convicted of adultery shall marry again until the death of the complainant. Here again is the phrase "convicted of adultery," but used in such collocation that, beyond doubt, it means convicted of adultery, not only by proof and verdict of the fact, but by a judgment of the court upon the fact, convicting of the adultery, and adjudging a dissolution of the then existing marriage contract, so that, it being naught, another new marriage might be had but for the prohibition of the statute.

Again, our decision in *Pitts v. Pitts* (52 N. Y., 593) is an authority for the holding that we now make. There the wife

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Opinion of the Court, per FOLGER, J.

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had been proven to have been guilty of adultery. The fact was found, but no judgment of divorce was rendered, because there had been a condonation by the husband. Yet she was convicted as much as the wife of Dietz was.

Nor does an adherence to the literal reading of the section relied upon unavoidably lead to the conclusion of the plaintiff. Doubtless the word *conviction* ordinarily signifies the finding of the jury by a verdict that the accused is guilty. Yet the word sometimes denotes the final judgment of the court. (2 Dwarries on Stat. [2d London ed.], 683; *Foster's Case*, 11 Rep., 107; *Keithler v. State* 10 Sm. & M. [18 Miss.], 192; *Reg. v. Hincks*, 1 Den. Cr. Cas., 84.) Thus the case of a witness rendered incompetent to testify, by conviction for an infamous crime, has an analogy. The language of the law is, that he is rendered incompetent by his conviction of treason, felony or *crimen falsi*; but to shut him from the witness-box, his conviction must be shown by a judgment. (*The People v. Herrick*, 13 J. R., 82; *The People v. Whipple*, 9 Cow., 707; see, also, 10 Sm. & M., *supra*; 1 Den. Cr. Cas., *supra*, where POLLOCK, B., says: "A verdict of a jury in a civil cause is not evidence without judgment.")

We are therefore of the opinion that Harriet Dietz, though declared by the finding of fact of the referee to have committed adultery, yet never adjudged therefor to be divorced from her husband, is still his wife, and entitled to her dower in his lands if she survives him.

It follows that this possibility of dower affects the title tendered by the plaintiff, and that the judgment of the General Term was right and must be affirmed.

All concur.

Judgment affirmed.

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Statement of case.

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THE PEOPLE ex rel. JOHN H. ATKINSON et al., Commissioners of Highways, etc., Appellants, v. GILBERT TOMPKINS, Jr., Supervisor, etc., Respondent.

Under section one of the act extending the power of boards of supervisors (§ 1, chap. 855, Laws of 1869, as amended by chap. 260, Laws of 1874), which confers power on said boards, with the consent of certain town officers, to authorize the borrowing of money on the credit of a town for the building and repair of roads and bridges, it is not essential that the town officers named should meet for the purpose of determining the amount to be borrowed on the first Monday of September; the provision of said section requiring a meeting on that day in each year is directory merely, and it is sufficient if meeting is held prior to the first Monday of October.

The provision of said section authorizing the board of supervisors to prescribe the form of obligation to be issued for the loan includes the naming of the town officer who is to execute the obligation, and they may impose this duty upon the supervisor of the town.

Where the specified officers of a town have met within the time limited by the section and have determined the amount to be borrowed and the board of supervisors has conferred the requisite authority to issue bonds of the town for the amount, no subsequent meeting of said officers is necessary for the purpose of authorizing or consenting to such issue.

Where a supervisor of a town is required by the board to execute the bonds, it is no excuse for a refusal that the certificate of consent required by said section to be indorsed by the town clerk upon the bonds is not in due form; a proper certificate can be added as well after as before the execution, and it is the duty of the supervisor to see that any error is rectified.

Section two of said act provides for a different and distinct class of cases from those provided for in section one, and a supervisor of a town required to issue bonds, under and in pursuance of section one, is not justified in refusing so to do because two-thirds of the members of the board of supervisors did not assent to the resolution authorizing the loan and directing such issue, or because it did not receive his affirmative vote, as required in cases included in section two.

(Argued January 18, 1876; decided January 25, 1876.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, reversing an order of Special Term directing the issue of a writ of peremptory

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Statement of case.

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mandamus to defendant, as supervisor of the town of Cornwall, Orange county, directing him to borrow, on the credit of the town, the sum of \$3,500 to build and repair certain roads therein, and to execute certain bonds for that purpose. (Reported below, 6 Hun, 299.)

On the 24th September, 1874, in pursuance of section one, of chapter 855, Laws of 1869, as amended by chapter 260, Laws of 1874, the town officers of said town of Cornwall met to determine the amount of money necessary for highway purposes; at which meeting a certificate in writing was executed by the commissioners of highways, the town clerk and three of the four justices of the peace, to the effect that they deemed it necessary to raise the sum of \$3,500 for the building and repair of certain specified roads, and giving their consent that such sum be borrowed on the credit of the town. This certificate was presented to the board of supervisors of the county at its next annual meeting and said board adopted a resolution directing the supervisor of said town to borrow said sum, on the credit of the town, for the purposes specified, and directing that for the loan the bonds of the town should be given, executed by the supervisor and town clerk. Two-thirds of the members of the board did not vote for the resolution, and defendant who, as supervisor of said town of Cornwall, was a member of the board, voted against it. No subsequent meeting of the town officers of Cornwall was held for the purpose of consenting to the issue of the bonds. Bonds to the amount named were presented by the relators to defendant, and he was requested to execute and negotiate the same. This he refused to do. Upon the bonds, as presented, were indorsed certificates of the town clerk to the effect that they were issued with the written consent of the commissioners of highways, town clerk and justices of the peace of the town, given at a meeting held September 24, 1874.

*Samuel Hand* and *Lewis Beach* for the appellants. The fact that the meeting was not held on the first Monday in September does not invalidate the action of the town officers.

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Opinion of the Court, per MILLER, J.

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(*Julian v. Rathbone*, 39 N. Y., 369; *People v. Suprs. Ulster Co.*, 34 id., 268; *People v. Village of Yonkers*, 39 Barb., 268; Potter's Dwar. on Stat., note 29, pp. 222-226.) It was not necessary that all four justices should sign the certificate of consent. (2 R. S. [2d Edm. ed.], 575; *People v. Nichols*, 52 N. Y., 478.)

*H. Gedney* for the respondent. The proceedings of the town officers in making and signing the certificate were void. (*People v. Suprs. of Ulster*, 34 N. Y., 268; 39 id., 196; *Sears v. Burnham*, 17 id., 448; 2 Dal., 316; 4 Pet., 152; *Sharp v. Spiers*, 4 Hill, 76.)

MILLER, J. This appeal involves the construction to be placed upon the first and second sections of chapter 855, of the Laws of 1869 as amended by chapter 260 of the Laws of 1874, which several acts relate to the extension of the powers of boards of supervisors, except in the counties of New York and Kings. It is evident upon a careful perusal of the sections referred to, that the intention of the Legislature was to provide for two classes of cases, and each one distinct and separate from the other. By the first section the board of supervisors are vested with power to authorize the supervisor of any town in the county, with the consent of other town officers who are named, to borrow such sum of money, upon the credit of the town, not exceeding one-half of one per cent on the assessed valuation, as said town officers may deem necessary, to build or repair roads and bridges. The board are also to prescribe the form of the obligation to be issued for the loan, the time and place of payment, the rate of interest, and to impose a tax for the collection of the same as provided. The provision cited also contains directions as to the meeting of the town officers to determine what amount shall be borrowed, the issuing of the bonds and other matters connected with the same, and the entire section constitutes a complete system for incurring the debt and its payment, upon the application of the town officers named and



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the co-operation of the board of supervisors. This plan could be made effective by means of the section cited above and of itself without regard to any other provision of the act in question ; and in cases where the application is instituted originally by the town officers named, the proceedings of the board are to be conducted the same as any other proceedings had before them.

The second section of the act partakes entirely of a different character. It nowhere refers to the preceding section, or to any proceedings had by virtue thereof. The town officers are not named in any way, and it was manifestly designed to provide for cases where the application was not made by the officers named, acting under and by virtue of the provision contained in the first section of the act, but by some other party, or by some officer, independent of the said section. It confers upon the board of supervisors additional and different powers than those to be exercised under the first section, and authorizes them to provide for the use of abandoned turnpikes, plank or macadamized roads as public highways, as well as the improvement of public highways, and the location, erection, repair and purchase of bridges. Some of them are improvements not embraced in the first section of the act, and even if the latter may include the former, it is nevertheless evident that the section last cited was not intended to include cases where the town officers as such had made the application ; and it was for this reason no doubt that the vote of two-thirds of the members of the board was required, as well as the affirmative vote of the supervisor of the town or ward affected by the debt to be incurred. It cannot be claimed that any consent of the town officers is necessary under the second section, nor can the two sections be construed together so as to be harmonious and consistent. They are incongruous and in conflict with each other, and cannot be reconciled with any rule of interpretation applicable to the construction of statutes. It follows that the supervisor was not justified in refusing to issue the bonds upon the ground that the second section had not been complied with.



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Opinion of the Court, per MILLER, J.

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Nor is there any other valid ground of objection to the proceedings.

The provision requiring that the town officers meet at a time named in the statute is merely directory, and it was sufficient that a meeting was held prior to the first Monday of October instead of the precise day specified.

The board were fully authorized to prescribe the form of the obligations to be issued for the debt created, and this necessarily included the name of the officer who was to execute the same, and therefore they did not exceed their powers in requiring the supervisor to execute the bonds.

The point taken, that the bonds presented for signature were not in compliance with the statute because the certificate was insufficient, is without foundation. The language of the certificate was sufficient to show what was intended, and was substantially in accordance with the statute. But if it was not, as the statute was directory in this respect, and the certificate could be added after the bonds were executed as well as before, it was not material. It certainly was not a reason for refusing to issue the bonds when no objection was made to the form of the same by the supervisor whose duty it was to see that they were in proper form, and to rectify any error which may have existed. Nor was any meeting necessary for the purpose of authorizing the issuing of the bonds, after the board of supervisors had conferred the requisite authority.

The proceedings throughout were regular and valid, and the order of the General Term should be reversed, and a mandamus issue as directed by the Special Term, with costs.

All concur.

Ordered accordingly.

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THE PEOPLE OF THE STATE OF NEW YORK, Appellants, v.  
CORNELIUS M. HORTON et al., Respondents.

Where a respondent seeks to restrict the general right to appeal to this court by applying the limitation prescribed by the amendment of 1874 to section 11 of the Code (chap. 322, Laws of 1874), it is for him to show that the subject-matter of the controversy does not exceed \$500. This action was brought to restrain the carrying on of a business; no sum of money was demanded in the complaint, nor was the value of the business stated in the pleadings; judgment was given for the defendant. The testimony showed the yearly value of the business to be more than \$500. *Held*, that plaintiffs were entitled to appeal to this court.

(Argued January 18, 1876; decided January 25, 1876.)

THIS was a motion to dismiss an appeal from a judgment of the General Term of the Supreme Court in the fourth judicial department, affirming a judgment in favor of defendants. (Reported below, 5 Hun, 516.)

The action was brought to restrain defendants from using a floating elevator for the purpose of transferring cargoes of grain from one vessel to another in the waters of Buffalo harbor. No sum of money was demanded in the complaint, and no amount was stated in the pleadings as the value of the business carried on by the defendants and sought to be restrained. There were allegations in the pleadings that the business was extensive, and from which it could be inferred that the yearly value thereof was more than \$500, and the testimony on the trial showed this to be the fact. Further facts appear in the opinion.

*G. A. Scroggs* for the appellants.

*M. A. Whitney* for the respondents.

FOLGER, J. The act of 1874 (Laws of 1874, chap. 322) denies an appeal to this court in certain cases. It starts with the general declaration, that no appeal shall be taken from

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Opinion of the Court, per FOLGER, J.

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any judgment or order granting or refusing a new trial, where the amount of the judgment, or the amount of the subject-matter in controversy in the action or proceeding, does not exceed \$500, exclusive of costs. This general provision, applied to the case in hand, will not bar the appellants of an appeal to this court. Though no sum in money is demanded in the complaint, and no amount is stated in the pleadings, as the value of the business carried on by the respondents, which it is the object of the action to restrain; still it appears in the case approximately what that value is. It is inferable, from the allegations of the pleadings, that the business of the defendants sought to be enjoined and forbidden, is in yearly value more than \$500. It is shown in the testimony that the defendants, during the season in which the trial took place, transferred with their elevator over 2,000,000 bushels of grain. It appears that it was worth to do this one-half cent per bushel, which would give over \$10,000 as the result in gross to the defendants of that season's business. Whether or no they shall be restrained from longer carrying on this business is the question at issue in the action, and is the subject-matter of the controversy. That subject-matter is therefore in amount more than \$500.

It is insisted, however, by the respondents, that as this is not an action on contract, it is to be governed by one of the particular provisions of the act, to wit: That the amount claimed in the complaint shall be deemed the amount of the subject-matter of the controversy. On referring to the complaint, no amount is there claimed; that is, there is no amount specified in dollars. Then say the respondents, the subject-matter in controversy is of no amount, and there is no privilege of appeal. But is it not as reasonable to say, if no amount is claimed in the complaint, how are we to know from it that the subject-matter is not \$500 in amount? The case falls within the general provisions of law giving a right of appeal to this court. It is sought to restrict that general right, by applying to the case the special prohibitory provisions of the act of 1874. In this the respondents have the *onus*. It is

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for them to bring the case within that act, to show that the subject-matter of the controversy does not amount to \$500. There is no judgment for the plaintiffs by which that amount appears; the judgment is for the defendant. They then seek to apply the particular provision of the act above mentioned, but on reference to the complaint there is no amount claimed. Do they not fail then, to show that the value of the subject-matter controverted, falls below the *maximum* of the statute, unless they can show it by the general allegations of the complaint of the subject-matter of the action, or by the testimony? The latter, as already appears, shows a value greater than \$500. From the former we should feel bound to infer a like result. The defendants are not brought within the act. It follows that the plaintiffs are not barred from their right of appeal.

The motion is denied, but as the question is now for the first time presented, without costs to either party against the other.

All concur.

Motion denied.

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IN THE MATTER OF THE APPLICATION OF THE NEW YORK  
CENTRAL AND HUDSON RIVER RAILROAD COMPANY FOR THE  
APPOINTMENT OF COMMISSIONERS TO APPRAISE CERTAIN  
LANDS, ETC., OF ALEXANDER CUNNINGHAM et al.

The Supreme Court at Special Term has power to vacate an order confirming the report of commissioners appointed to appraise the compensation for lands sought to be taken for railroad purposes, and thereupon to set aside the report and to appoint new commissioners; the owner is not confined to the remedy by appeal to the General Term given by the general railroad act. (§§ 17, 18, chap. 140, Laws of 1850.) Where cause is shown for thus setting aside the proceedings the court is the judge of the sufficiency thereof, and the granting such relief is within its discretion, the exercise whereof may be reviewed by the General Term, but not in this court.

*R. and S. R. R. Co. v. Davis* (43 N. Y., 137) distinguished.

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The report of commissioners may be set aside for misconduct, palpable error or accident on the part of the commissioners such as would authorize the setting aside of a verdict or the report of a referee; and what would authorize a Special Term to excuse a default of a party and to set aside an inquest or a dismissal of a complaint taken at a Circuit, will empower it to vacate the order of confirmation.

(Argued January 16, 1876; decided January 25, 1876.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, affirming an order of Special Term vacating a prior order which confirmed the report of commissioners appointed to ascertain and appraise the compensation to be made the owners of real estate sought to be taken for railroad purposes, and setting aside the report of the commissioners and appointing new commissioners. (Reported below, 5 Hun, 105.)

The affidavits upon which the motion was made tended to show irregularity upon the part of the commissioners amounting to misconduct, gross inadequacy of the compensation allowed by them, and ignorance on the part of the owners of the application to confirm the report on account of neglect or misconduct of their attorneys.

*A. P. Laning* for the appellant. The court had no power on motion to set aside the commissioners' report or the order confirming such report, or to appoint new commissioners. (Laws 1850, chap. 140, §§ 17, 18; *N. Y. and E. R. R. Co. v. Coney*, 5 How. Pr., 177; *Vischer v. H. R. R. R. Co.*, 15 Barb., 37; *A. and No. R. R. Co. v. Cramer*, 7 How. Pr., 164; *In re Bleecker St.*, 20 J. R., 269; *In re Morris Square*, 2 Hill, 14; *N. Y. C. R. R. Co. v. Marvin*, 1 Kern., 276; *Mayor, etc., v. Erben*, 38 N. Y., 305; *In re Mayor, etc., of N. Y.*, 49 id., 150; *In re N. Y. and J. R. R. v. Wilson*, 21 How. Pr., 434; *In re A. and S. R. R. Co. v. McCloskey*, 2 N. Y. S. C., 638.) There was no valid reason for vacating the order confirming the commissioners' report, or for setting aside their report disclosed by the moving papers. (*R. and S. L. R. R. Co. v. Budlong*, 6 How. Pr., 467; Laws 1850,

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chap. 140, §§ 16, 18; *B. and N. Y. C. R. R. v. Brainerd*, 5 Seld., 100; *In re R. and O. R. R. Co. v. Deyo*, 5 Lans., 298; *T. and B. R. R. Co. v. Lee*, 13 Barb., 169, 171.)

*Spencer Clinton* for the respondent. The court had power to set the report aside and vacate the order of confirmation. (*In re N. Y. and O. M. R. R. Co.*, 40 How. Pr., 335; *In re Mayor, etc., of N. Y.*, 49 N. Y., 150; *Nesmith v. Clinton F. Ins. Co.*, 8 Abb., 141; *People v. Douglass*, 4 Cow., 264; *Oliver v. Trustee, etc.*, 5 id., 283; *Gale v. Gwinits*, 4 How. Pr., 253; *Dorlon v. Lewis*, 9 id., 1; *Roosa v. S. and W. T. R. Co.*, 12 id., 297.)

FOLGER, J. The power to institute, control and review, the proceedings of commissioners in street opening cases and in cases of taking lands for railroad purposes, is given to the Supreme Court, as the court of the Constitution, and not to the judges thereof, in such way that they must act as a tribunal of inferior jurisdiction created by statute, or as commissioners appointed by the legislature. (*N. Y. C. R. R. v. Marvin*, 11 N. Y., 276; *Matter of Canal St.*, 12 id., 406; *In re Osw. and Mid. R. R.*, 40 How. Pr., 335). It follows that at Special Term the court has all its powers in dealing with those cases, among which is the power to control all the proceedings had before it and to set them aside on sufficient cause shown. (12 N. Y., *supra*; 40 How. Pr., *supra*; *In re Mayor, etc., of N. Y.*, 49 N. Y., 150.) There are cases cited by the appellant, in which expressions are found in the opinions, to the effect that there exists no other remedy for the party considering himself aggrieved than the appeal to the General Term given by the statute. But those expressions are based upon the fact of the entire regularity of the proceedings of the commissioners, or upon a different view of the powers of the Supreme Court from that announced in the authorities cited by us, or were made where the facts of the case did not call for an adjudication upon this question. It is to be noticed of the case cited from 38 New York, 305,

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that the report is just the reverse of the truth. The opinion there given was a dissenting opinion, in which the court did not concur but adjudged in direct opposition to the conclusions of it. (See 1 Alb. Law Jour., 265; 35 How. Pr., 644.) When cause is shown for setting aside an order confirming a report of commissioners, or for setting aside the order appointing the commissioners, it is for the court to judge of the sufficiency thereof. There is the power to entertain the motion to that end. If there be not an entire lack of merit in the motion, whether it shall be granted is a question of discretion. The exercise of that discretion may be questioned and reviewed at General Term, but not in this court. It is so in the kindred case of setting aside the report of a referee for his misconduct, or in refusing to do so, although there may be a substantial right involved in the determination. (*Livermore v. Bainbridge*, 56 N. Y., 72.)

It is good cause for the Special Term to set aside the proceedings in such cases, if there has been such carelessness or irregularity on the part of the commissioners, as amounts to misconduct by which a party has been harmed. The same reason which would lead to the setting aside of a verdict of a jury, or a report of a referee, for the misconduct, palpable mistake or accident of either, will suffice for the like interference with the report of commissioners; and what would authorize a Special Term to excuse the default of a party, and to set aside an inquest or a dismissal of a complaint taken at a Circuit, will empower it to interfere in these cases. It is not to be denied that the affidavits read by the respondents did disclose a case calling for the exercise of the power of the Special Term to investigate and of its discretion to act. Hence there is no appeal to this court from the order made by it and affirmed by the General Term.

The position of the appellants is not tenable, that by the confirmation of the report of the commissioners the title to the property taken was so vested in them as that this becomes an appealable case, within the decision of *Rensselaer and Saratoga Railroad v. Davis* (43 N. Y., 137).

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There the party appealing was the owner of the premises taken before the proceedings were commenced, and the very ground of the appeal went to the right, at all, to institute the proceedings. His right was vested before the railroad company moved in the matter, and the question was whether it should be divested by such proceedings when there was no statutory ground for instituting them. Here the right of the appellants, if any, is the result of the proceedings, and depends upon the upholding of them; and the question at the Special Term was, whether they were not so vicious and irregular as that they should not be upheld. (See 49 N. Y., *supra*.) It is like the case of a plaintiff buying lands at a sheriff's sale on execution issued upon his own judgment. His title depends upon the validity of his judgment. If it is vacated, he has no foundation for his title. Surely, it is no reason that it should not be vacated, that he has bought and holds under it. Whether he holds, and whether it should be vacated, hang upon the same question, whether it is regular and valid.

It is true that the order not only sets aside the report of the commissioners, and again orders appraisal to be made, but it vacates the appointment of the first commissioners and makes a new appointment of others. The court had the power to revoke the appointment of the first commissioners for good cause shown; and it also had the power to set aside the confirmation of their report for good cause shown, and to reject it. When those things were done, there were no commissioners and no appraisal and no report. But there was before the court the petition asking for an appraisal, and for the appointment of commissioners to that end. The parties were all before the court. There was no reason why the court should not grant the prayer of the petition, and appoint commissioners and order an appraisal. It was no more bound to name the same commissioners than to name the same referee in a kindred case. It would be a new appraisal, in fact. In legal contemplation, it would be an original appraisal, for the other was then as if it had never been. So



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that the appraisal directed by the order appealed from will not be, technically, the new appraisal of the statute (Laws of 1850, chap. 140, §§ 17 and 18); it will be the appraisal which the statute in the first instance authorizes. The fallacy is in assuming that the Special Term, in vacating the prior orders, was traveling in the path of the statute. It was exercising its inherent power over the proceedings of the court to annul, vacate and set them aside, which power stands by the side of the statute and goes with it. After this was done, it entered again upon the way of the statute.

As the Special Term had the power to entertain the motion, and as the moving papers showed matter for the exercise of its discretion, the order made by it and affirmed by the General Term is not appealable to this court.

The appeal must be dismissed.

All concur; ALLEN, J., not sitting.

Appeal dismissed.

WHITE'S BANK OF BUFFALO, Appellant and Respondent, v.  
ASHER P. NICHOLS, Appellant and Respondent.

Where a deed describes the granted premises as beginning at the intersection of the exterior lines of two streets, the point thus established controls the other parts of the description, and lines running along the streets are thereby confined to the exterior lines of the streets, and the soil of the street is not included in the grant.

Descriptions in grants are to be interpreted in reference to monuments and circumstances existing at the time, in the absence of any evidence in the grant that the parties contemplated a shifting boundary or any change in the lines; a change, therefore, in the point of intersection of two streets thus made the starting point, by a change in the width of one of the streets, will not extend or affect the grant.

An owner of an easement does not, by asserting a right to the fee of the servient estate, and by taking possession thereof, destroy his right to the easement. No acts of such owner will extinguish his right, save those that indicate his intention to abandon it, unless other persons have been led by such acts to believe the right abandoned, and to act upon the belief so that an assertion of the right will be to their injury.

B. and P., being the owners of certain lands in the city of Buffalo, divided

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| 64  | 65  |
| 110 | 608 |
| 64  | 65  |
| 135 | 345 |
| 64  | 65  |
| 138 | 191 |
| 64  | 65  |
| 139 | 401 |
| 64  | 65  |
| 141 | 801 |
| 64  | 65  |
| 142 | 181 |

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| 64 | 65     |
| 77 | AD'489 |
| 77 | AD'491 |

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it into lots and caused a map to be made thereof, designating thereon G. street as sixty-three feet wide. They conveyed a lot by deed, under which defendant claims, in which the granted premises were described as commencing at the intersection of the exterior lines of G. and another street. B. and P. subsequently conveyed their interest in the soil of G. street, and this interest was conveyed to plaintiff. G. street, as laid out, was opened and used, but was, after such deed was executed, reduced by the common council of the city to a width of twenty-three feet, the center line remaining the same. Defendant took possession of and fenced in the portion of the street adjoining his inclosure up to the new line, claiming to own the fee. In an action of ejectment to recover the land between the old and new street lines, *held*, that the soil of the street was not included in the grant under which defendant claimed, but the fee thereof was in the plaintiff; that the change of the exterior lines of the street did not change or affect defendants' boundary lines; that his grant, however, gave to him an easement in the premises in question, which easement was not extinguished by his inclosing the land and asserting a right to the fee; also, *held*, that the fact that defendant had taken exclusive possession did not entitle plaintiff to an unqualified judgment, but simply to judgment giving him possession subject to defendant's easement.

(Argued January 19, 1876; decided February 1, 1876.)

THESE are cross appeals from a judgment of the General Term of the Supreme Court in the fourth judicial department, modifying, and affirming as modified, a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

This was an action of ejectment. In the year 1834 George R. Babcock and Heman B. Potter were the owners of block number thirty-one, in the city of Buffalo. In that year they made a map of this block, dividing it up into lots, and designating Garden street, extending from Carolina street to Virginia street, sixty-three feet wide. After the making of this map, and with reference to it, they sold and conveyed, by warranty deeds, all those portions of said block bordering on Garden street as so laid. They conveyed to Philander W. Sawin, July 22, 1835, lot number five on said copy of map, described in the deed as follows: "Beginning on the north-westerly line of Carolina street at its inter-

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section with the north-easterly line of Garden street; thence north-westerly along the north-easterly line of said Garden street to a part of said block heretofore conveyed by the said Heman B. Potter and his wife and George R. Babcock to one Jacob T. Merritt; thence north-easterly bounding on said Merritt's land to the north-easterly line of said block; thence south-easterly along the line of said block to the State line; thence southerly along the State line to Carolina street, and thence south-westerly bounding on Carolina street to the place of beginning, containing more or less."

By quit-claim deeds executed in 1853 they conveyed to one John A. Campbell their interest in Garden street, and the interest acquired by Campbell under those deeds has vested in the plaintiff.

Defendant acquired the interest in said premises conveyed to Sawin, and inclosed his lot with the fence on the easterly line of Garden street, being on the easterly line of said street, as a street sixty-three feet wide, as located on said map. The other owners of property on both sides of Garden street through to Virginia street also inclosed their lots, placing fences on the east and west sides of Garden street, as sixty-three feet wide, and said street so remained until 1869.

In February, 1869, the common council of the city of Buffalo ordered the lines of Garden street to be staked out, and the boundaries recorded, and this was done, the boundaries being the same as shown by the map. In July, 1869, a petition was presented to the common council signed by land-owners fronting upon the street, asking that Garden street be contracted to the width of twenty-three feet. In accordance with this petition, and pursuant to the city charter, a resolution was duly passed in August, 1869, directing such contraction, and the record of the street accordingly, which contraction and record were made accordingly. In May, 1873 the defendant inclosed with a substantial fence, and took actual and exclusive possession of the premises between the old and the new line of Garden street, which are the premises described in the complaint.

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The Special Term gave judgment adjudging that defendant deliver up possession of the premises, "and that the plaintiff have possession thereof."

The General Term modified the judgment by adding after the words above quoted the following: "Subject to an easement of defendant therein, of passage to and from Garden street over said premises."

*James J. Allen* for the appellant. The conveyance, under which defendant claims, vested in the grantee the title to the center of Garden street, subject to the easement of the street. (*Bissell v. N. Y. C. R. R. Co.*, 23 N. Y., 62; *Perrin v. N. Y. C. R. R. Co.*, 36 id., 120; *Lozier v. N. Y. C. R. R. Co.*, 42 Barb., 465; *Berridge v. Ward*, 100 E. C. L., 400 [10 C. B., N. S.]; *Paul v. Carver*, 24 Penn., 207; 26 id., 224; *Cox v. Friedley*, 33 id., 124; *Champlin v. Pendleton*, 13 Conn., 23; *Johnson v. Anderson*, 18 Me., 76; *Stiles v. Curtis*, 4 Day, 338; 2 Smith's L. Cas. [6th Am. ed], 237; Tyler on Law of Boundary, 109; *Buck v. Squires*, 22 Vt., 493-497; *Adams v. S. and W. R. R. Co.*, 11 Barb., 414, 452, 453; *Walter v. Tifft*, 14 id., 219; *Durham v. Williams*, 37 N. Y., 251; *People v. Lambeir*, 5 Den., 16; 3 Kent's Com. [10th ed.], 566, note *a*; *Wallace v. Fee*, 50 N. Y., 694; *Glover v. Shields*, 32 Barb., 374.) The frontage on Garden street as a public street, so long as it should remain a street, was to be enjoyed by Sawin and his grantees perpetually under the deed. (*Bissell v. N. Y. C. R. R. Co.*, 23 N. Y., 61; 36 id., 120; 42 Barb., 465; Ang. on Watercourses, chap. 5; *Jackson v. Hathaway*, 15 J. R., 447; *Cook v. McClure*, 58 N. Y., 441.) If defendant had not the title to the premises, he had an easement thereon which could not be lost by disuse. (*Fox v. United Sugar Refinery*, 109 Mass., 292; *Bissell v. N. Y. C. R. R. Co.*, 23 N. Y., 63; *Jewett v. Jewett*, 16 Barb., 157; *Smyles v. Hastings*, 22 N. Y., 224; *Ward v. Ward*, 14 E. L. and Eq., 413.) To establish an extinguishment, the intent to abandon the easement must be proved. (*Dyer v. Sanford*, 9 Metc., 402; *Hayford v. Spokesfield*, 100 Mass., 491; *Lovell v.*

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*Smith*, 3 C. B. [N. S.], 120; *Ward v. Ward*, 7 Exch., 838; *Hale v. Oldroyd*, 14 M. & W., 789.)

*Sherman S. Rogers* for the respondent. The deed from Babcock and Potter to Sawin conveyed to the line of the street only, and not to the center of it. (*Childs v. Starr*, 4 Hill, 382; 20 Wend., 149; *Halsey v. McCormick*, 3 Kern., 296; *Sherman v. McKeon*, 38 N. Y., 272; *Hammond v. McLachlan*, 1 Sand., 323; *Herring v. Fisher*, id., 344; *Jones v. Cowman*, 2 id., 234; *Anderson v. James*, 4 Robt., 38; *Coster v. Peters*, 5 id., 204; *Wetmore v. Law*, 34 Barb., 515; 2 Smith's L. Cas., 187; *Newall v. Ireson*, 8 Cush., 598; *Sizer v. Devereux*, 16 Barb., 166.) Defendant by fencing in the *locus in quo* and offering it for sale, abandoned his easement in the same as a part of Garden street. (Washb. on Easements, 541, 548; *Crain v. Fox*, 16 Barb., 184; 3 Kent's Com., 449; 2 Washb. on R. E., 25.) Whether the easement was or was not abandoned, this action will lie because defendant had appropriated the street to his exclusive use in a way to subvert the public use. (*Williams v. Cen. R. R. Co.*, 16 N. Y., 97; *Carpenter v. O. and S. R. R. Co.*, 24 id., 655; *Wager v. T. U. R. R. Co.*, 25 id., 526; *Perrin v. N. Y. C. R. R. Co.*, 36 id., 120, 127.)

ALLEN, J. Both plaintiff and defendant appeal from the judgment of the Supreme Court in this action, each claiming to be entitled to the exclusive possession and beneficial enjoyment of the premises in dispute. The court below adjudged the plaintiff to be the owner in fee, and the defendant to be entitled to an easement in the premises, substantially destructive of the value of the proprietary right of the plaintiff.

Both parties derive title from a common source, that of the defendant being prior in point of time to that under which the plaintiff claims. The controversy hinges upon the construction and effect of the grant of the original proprietors of the premises owned by the defendant, and the extent and limits of that grant. The original proprietors being the

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owners of a large tract in the city of Buffalo, of which the premises in dispute, as well as those confessedly owned by the defendant were a part, subdivided the same into lots, making a map thereof upon which was designated a street called Garden street, sixty-three feet in width, and conveyed the several lots or parcels to different grantees with reference to the map. The premises of the defendant were conveyed to one Sawin, and bounded upon Garden street on the west, and the defendant, as the grantee of Sawin, claims that the grant carried the fee to the center of the street, subject to an easement in favor of the grantees of other portions of the tract and the public, in the street as laid down upon the map, and that the width of the street having been reduced by twenty feet upon each side, he is the owner of that twenty feet divested of the easement.

Whether a grant of lands bounded by a street, highway or running stream, extends to the center of such street, highway or stream, or is limited to the exterior line or margin of the same, depends upon the intent of the parties to the grant as manifested by its terms, so that the question as to the true boundary is, in all cases, one of interpretation of the deed or grant.

Learned judges have contended, and in some of the States it has been substantially held, that in such cases the question of boundary is rather one to be determined by reasons of public policy than by the intent, determined by the ordinary rules of construction, although in no instance is it claimed that a grantor may not restrict his grant so as to exclude the soil of the street, highway or stream; the most that is claimed by any is that nothing short of an intention, expressed *in ipsius verbis*, to exclude the soil in such cases should exclude it.

The rule, however, in this State is well settled, that no particular words or form of expression is necessary to restrict the grant to the exterior line of a street or margin of a stream, and exclude the soil of each; but that while the presumption is in every case that the grantor does not intend to retain the fee of the soil within the lines of the street or under the

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water, such presumption may be overcome by the use of any terms in describing the premises granted, which clearly indicate an intent not to convey the soil of the street or stream. It is not sufficient to exclude from the operation of the grant the soil of a highway, *usque ad medium filum*, that the grant is made with reference to a plan annexed, the measuring or coloring of which would exclude it, or by lines and measurements which would only bring the premises to the exterior line of the highway, or that they are bounded generally by the line of the highway or along the highway, or by any similar expressions.

Although the highway is in one sense a monument, it is regarded as a line, and the center of the highway in such case is regarded as the true boundary indicated, as is the case when a tree, stone or other similar object is designated as a monument; the center, in the absence of any other indication, is regarded as giving the true boundary or limit of the grant. (*Berridge v. Ward*, 10 C. B. [N. S.], 400; *Wallace v. Fee*, 50 N. Y., 694; *Perrin v. N. Y. C. R. R. Co.*, 36 id., 120; *Bissell v. The Same*, 23 id., 61; *Banks v. Ogden*, 2 Wall., 57.) But when the words clearly indicate an intention to exclude from the operation of the grant the soil of the highway, it is equally well settled that it does not pass, and the grantor retains the title, subject only to any easement which may exist in the public or in the grantee of the adjacent lands. (*Marquis of Salisbury v. G. N. Railway Co.*, 5 C. B. [N. S.], 174; *Jackson v. Hathaway*, 15 J. R., 447; *Smith v. Slocomb*, 9 Gray, 36; *Hoboken Land Co. v. Kerrigan*, 30 N. J. Law Rep., 16.) The grant under which the defendant claims title, describes the granted premises as commencing at the intersection of the exterior lines of two streets, of which Garden street is one, and so as necessarily to exclude the soil of the street. The point thus established is as controlling as any monument would have been, and must control the other parts of the description; all the lines of the granted premises must conform to the starting point thus designated, so that while but for this designation of the commencement



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of the survey or boundary, the lines along Garden street and Carolina street might, within the general principles before referred to, be carried to the center of those streets respectively, they are necessarily confined to the exterior lines of the streets, so as to connect at this starting point. The precise point was decided by this court. (*English v. Brennan*, 60 N. Y. [Mem.], 609.)

The defendant therefore acquired, and has, no title to the soil of the street, but the fee is in the plaintiff, and although the acquisition may be entirely barren and the recovery in this action be entirely fruitless, he is entitled to a judgment for the fee of the land subject to any easement which the defendant may have in the same.

The claim of the defendant which has something of plausibility and equity to sustain it, that upon the assumption that by the grant to Sawin the soil of the street was excluded, yet the exterior lines of Garden street being changed, the center remaining the same, his boundary line necessarily changed so as to conform to the reduced width of the street and preserve his frontage upon it cannot be sustained. The lines of his grant are fixed and permanent, and were established in reference to the circumstances as they then existed, and cannot be changed to conform to any altered condition, or circumstances, in the absence of any evidence in the grant that the parties contemplated a shifting boundary or any change in the lines or increase of the area of the lot granted, or to provide for any change in the line or width of the street as the same should be adopted or used by the public. Grants are always to be interpreted in reference to monuments and circumstances existing at the time, and cannot be extended so as to include other lands by implication or by conjecture that possibly had the parties foreseen changes in matters affecting the grant, they might have made it in other or different terms. (*Falls Village Waterpower Co. v. Tibbetts*, 31 Conn., 165; *Weisbrod v. C. and N. W. R. R. Co.*, 18 Wis., 35; *Banks v. Ogden*, *supra*; *Tibbetts v. Estes*, 52 Me., 566; *Kirkham v. Sharp*, 1 Whart., 323; *Cook v.*



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*McClure*, 58 N. Y., 437.) The defendant acquired no title either vested or contingent, in any part of the street as designated on the map, in reference to which his lot was granted by the original proprietors.

The only other question presented by the record is as to the claim of the defendant to an easement in the premises in question. The general rule is, that where the owner of land in a city lays out a street through it and sells lots on each side of the street, the public have an easement of way or right of passage, although it may not become a public highway in the ordinary sense of that term until the dedication is accepted and the street adopted by the corporation, and the grantees of the lots are entitled as purchasers to have the interval or space of ground left open forever as a street, and to the right of using the way for every purpose that may be usual and reasonable for the accommodation of the granted premises. Neither the corporation of the city, or the State authorities, or the grantor can do any act to impair this right or restrict the grantees in the enjoyment of it.

The lot owners having the right to this easement may exclude the owner of the soil himself. (*Kirkham v. Sharp*, *supra*; *In re Twenty-ninth St.*, N. Y., 1 Hill, 189.) When land is granted bounded on a street or highway there is an implied covenant that there is such a way, that so far as the grantor is concerned it shall be continued, and that the grantee, his heirs and assigns shall have the benefit of it. (*Parker v. Smith*, 17 Mass., 413; *Parker v. Framingham*, 8 Met., 260; *Bissell v. N. Y. C. R. R. Co.*, *supra*; *Fox v. The Union Sugar Refinery*, 109 Mass., 292.) The defendant did not, by his assertion of right to the fee and inclosing the land, destroy or extinguish his right to the easement. His action, based upon the idea that he owned the fee of the street, that the lesser was merged in the greater estate, was no evidence of his intention to surrender the easement for the benefit of the owner of the soil, should his claim to the fee prove to be ungrounded. An attempt to use the premises as owner of the fee did not indicate or tend to prove an intent .

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to abandon the easement. Mere non-user would not extinguish the easement, neither does a claim inconsistent with the easement have that effect. (*Smyles v. Hastings*, 22 N. Y., 217; *Hayford v. Spokesfield*, 100 Mass. 491; *Ward v. Ward*, 7 Exch., 838; *Hale v. Oldroyd*, 14 M. & W., 789; *Lovell v. Smith*, 3 C. B. [N. S.], 120.)

But it is urged in behalf of the plaintiff that the defendant, by fencing in the *locus in quo*, abandoned the easement, and that by such abandonment it was extinguished and gone forever. It is not easy to define what acts of the owner of an easement could operate to extinguish the same; but in all cases the act must be judged by the intention indicated by it, and nothing short of an intention to abandon the right will operate to extinguish it, unless other persons have been led by such acts to treat the servient estate as if free of the servitude. In such case the easement could not be resumed without doing injustice to those who have acted upon the faith that it was abandoned, and upon the appearance of abandonment. (Washburn on Easements, 543.) *Stokoe v. Singers* (8 E. & B., 31); *Corning v. Gould* (16 Wend., 531) and *Crain v. Fox* (16 Barb., 184), were decided mainly upon the theory of an estoppel, the court in each of the cases laying stress upon the fact that the owners of the easements claimed had, by their acts and the manner in which they had built upon the premises, induced the parties subsequently acquiring title to the servient premises to believe that they were free from the burthen of the easement. But where there has been no change in the title, and parties have not been led to change their position or condition in consequence of the acts of the owner of the easement, and the latter can resume the easement without injury to the rights of any one, he may do so, although he may temporarily cease to use the same, or his acts may be inconsistent with the existence of the easement. (*Stokoe v. Singers*, *supra*; *Lovell v. Smith*, *supra*.) In this case the act of the defendant in inclosing the *locus in quo*, must be referred to a purpose other than to abandon the easement. Both parties claimed to be the abso-

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lute owners of the land inclosed; the plaintiff claiming that by the change in the line of the street, it was discharged of the easement in favor of the plaintiff in respect to his lot, and of the public; and the defendant claiming that by the same change in the line of the street the boundary line of his lot was upon the line of the street as changed. The inclosure was with a view to the benefits which would result in any controversy that might arise from actual possession, and not with intent to abandon the easement if, in fact, his boundary line was upon the street as originally designated. The inclosure was the result of a mistake as to the limits of his grant, rather than evidence of an intent to abandon the right to a street upon the westerly line and adjoining his lot as the boundary should be finally determined.

It is also claimed in behalf of the plaintiff that the defendant, having taken exclusive possession of the premises in dispute, the judgment should have been without qualification in respect of the easement claimed. In support of this proposition he cites *Williams v. N. Y. C. Railroad* (16 N. Y., 97); *Carpenter v. O. and S. Railroad* (24 id., 655); *Wager v. The Troy Union Railroad* (25 id., 525); *Perrin v. N. Y. Cent. Railroad* (36 id., 120). In the first three cases referred to the defendants were trespassers, having no right to occupy the *locus in quo* for any purpose; and in the last case cited a judgment for the plaintiff was reversed by this court; so that nothing is decided affecting the question now made. The plaintiff here was not, as against the defendant, entitled to a judgment without qualification, and which might be held to destroy the easement. A judgment for the possession, subject to the easement, gave it all to which it was entitled.

The General Term of the Supreme Court properly modified the judgment at the Circuit by qualifying the right of the plaintiff, who was not entitled to the possession absolutely and divested of the easement of the defendant. A judgment against the defendant, giving the plaintiff as owner in fee an unqualified judgment for the possession, would have been erroneous, and only led to additional litigation, in which

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neither party could have gained any thing. The judgment appealed from establishes the rights of the parties according to well settled legal principles, and must be affirmed.

As both parties fail in their appeal, the affirmance should be without costs to either party, as against the other, in this court.

All concur.

Judgment affirmed.

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ELIAS G. BROWN, Appellant, v. HENRY L. VOLKENING,  
impleaded, etc., Respondent.

One who seeks to establish a right in hostility to a recorded title to or security upon land, under and by virtue of a prior unrecorded conveyance or prior equities, must show actual notice to the subsequent purchaser of his rights, or prove circumstances such as would put a prudent man upon his guard and from which actual notice may be inferred and found.

The possession which will be equivalent to actual notice to a subsequent purchaser must be an actual, open and visible occupation, inconsistent with the title of the apparent owner by the record; not equivocal, occasional, or for a special or temporary purpose. Constructive possession will not suffice.

The principle of constructive notice will not apply to an uninhabited and unfinished dwelling-house. (FOLGER, J., dissents.)

One asserting a right under a mortgagor prior to the mortgage, is a proper party to an action for foreclosure of the mortgage and the question of priority is proper to be determined in the action.

(Argued January 20, 1876; decided February 1, 1876.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, affirming a judgment in favor of defendant Volkening, entered upon a decision of the court.

This action was brought for the foreclosure of a mortgage given by Decker to plaintiff upon a house and lot in the city of New York. The answer of defendant Volkening, who

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| 121                | 503 |
| 64                 | 76  |
| 140                | 348 |
| 64                 | 76  |
| j 147              | 470 |
| 64                 | 76  |
| 152                | 48  |
| 64                 | 76  |
| j 160              | 66  |
| 64                 | 76  |
| 166                | 255 |
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| 75 AD <sup>1</sup> | 94  |

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alone defended, alleged, among other things, that at the time plaintiff's mortgage was executed he was the equitable owner of the premises, and that before the commencement of this action the same were conveyed to him by Decker.

He further alleged and proved that, prior to the execution of the mortgage in January, 1872, Decker, who was then building, upon the premises in question and upon adjoining lots owned by him, nineteen dwelling-houses, agreed with Volkening to sell him the premises, the consideration to be paid in mantels, mirrors and hall tiling to be furnished by Volkening for the nineteen houses, Decker agreeing to complete the house and deed it to Volkening on the first day of May, then next; that Volkening fully performed the agreement on his part. Said defendant also alleged that prior to the execution of the mortgage he had taken possession of the premises under said agreement, and that, at the time of taking his mortgage, plaintiff had full notice of all the facts and of defendant's rights and equities. Upon the subject of possession the court found as follows:

“That prior to the execution of the mortgage in said complaint mentioned, and on or about the 15th day of June, 1872, said Decker had surrendered the keys of the house to said Volkening and said Volkening had entered into and had the actual and exclusive possession of the premises in said mortgage mentioned and described as purchaser thereof, under and in pursuance of an agreement made and entered into by and between him and said Peter P. Decker, in January, 1872, for the sale and conveyance thereof by said Decker to him, and had made various alterations and improvements in the dwelling-house thereon exceeding, \$2,000 in value, and had, prior to July, 1872, so far performed said agreement on his part and paid the full consideration in said agreement mentioned, that he had become entitled to a specific performance thereof by said Peter P. Decker, and to a conveyance to him by said Decker and wife, free from any such incumbrances thereon as that subsequently attempted to be created by the said mortgage to the plaintiff.

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That such possession of said Volkening so continued, and at the time of the execution of said mortgage was actual and exclusive and could have been easily ascertained by the plaintiff by inquiry on said premises."

And, as matters of law:

"That such possession of said premises by said Volkening, as such equitable owner, was notice to the plaintiff of his rights; that the plaintiff was not a purchaser or incumbrancer of the said premises in good faith, and that the mortgage was not a valid lien, as against Volkening, and thereupon directed a dismissal of the complaint as to him." Judgment was entered accordingly. Further facts appear in the opinion.

*Amasa J. Parker* for the appellant. There was no possession on the part of Volkening that was equivalent to actual notice to plaintiff. (3 Wash. on R. P. [3d ed.], 123; 4 Kent, 2 id., 203; *Cook v. Travis*, 20 N. Y., 400, 402; *Chesterfield v. Gardner*, 5 J. Ch., 29; *Gouverneur v. Lynch*, 2 Paige, 300; *Freeman v. Freeman*, 43 N. Y., 34; *Grimstone v. Carter*, 3 Paige, 421-424; *Tuttle v. Jackson*, 6 Wend., 213; *Norcross v. Widgery*, 2 Mass., 508; *De Ruyter v. Trustees, etc.*, 2 Barb. Ch., 555; *Brice v. Brice*, 5 Barb., 533; *Buck v. Holloway's Devises*, 2 J. J. Marsh., 180; *Troup v. Hurlbut*, 10 Barb., 354; *Moyer v. Hinman*, 3 Kern., 180; *Webster v. Van Steenbergh*, 46 Barb., 211; *Merithrew v. Andrews*, 43 N. Y., 34; *Trustees, etc., v. Wheeler*, 59 Barb., 585; *Rupert v. Mack*, 15 Ill., 540; *Colby v. Kenniston*, 4 N. H., 262; *Patten v. Moore*, 32 id., 382; *Campbell v. Brackenbridge*, 8 Blackf., 471; *Coleman v. Barklew*, 3 Dutch., 357; *Holmes v. Stout*, 2 Stoct., 419; *McMeehan v. Griffing*, 3 Pick., 149; *Fassett v. Smith*, 23 N. Y., 252; *Emmons v. Murray*, 16 N. H., 385; *Smith v. Yule*, 31 Cal., 180; *Bell v. Twilight*, 32 N. H., 500; *Wygatt v. Elam*, 23 Geo., 201; *Truesdale v. Ford*, 37 Ill., 210; *Billington v. Welsh*, 5 Bin., 129; *White v. Wakefield*, 7 Sim., 401.) The onus was on defendant to show that plaintiff was a purchaser with notice, and such proof must be

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clear and satisfactory beyond doubt. (*Ware v. Egmont*, 4 De G., M. & G., 460; 1 Phil. Ev., 501; Broom's Leg. Max. [6th Am. ed.], 699; *Jackson v. Burger*, 10 J. R., 426; *Williamson v. Brown*, 15 N. Y., 354; *Fort v. Burch*, 6 Barb., 60; *Newton v. McLean*, 41 id., 288; *Wilson v. McCulloch*, 23 Penn. St., 440; *Dey v. Dunham*, 2 J. Ch., 182; *Jackson v. Van Valkenbergh*, 8 Cow., 260; *Cambridge Val. Bk. v. Delano*, 48 N. Y., 326; 2 Sugd. V. and P. [8th Am. ed., 1873], 484, 485; *Butler v. Stevens*, 26 Me., 484; *Mara v. Pierce*, 9 Gray, 306.) Defendant was bound to show that plaintiff knew of possession by Volkening. (*Chesterman v. Gardner*, 5 J. Ch., 29; *Grimstone v. Carter*, 3 Paige, 421; *Stuyvesant v. Hall*, 2 Barb. Ch., 151; *Troup v. Hurlbut*, 10 Barb., 354; *Gouverneur v. Lynch*, 2 Paige, 300; *Tuttle v. Jackson*, 6 Wend., 213-226; *De Ruyter v. Trustees, etc.*, 2 Barb. Ch., 555-558; *Brice v. Brice*, 5 Barb., 533; *Williamson v. Brown*, 15 N. Y., 354; *Cook v. Travis*, 20 id., 400; *Fassett v. Smith*, 23 id., 255; *Williamson v. Brown*, 15 id., 361; *Newton v. McLean*, 41 Barb., 288; *Merithrew v. Andrews*, 44 id., 200; *Baker v. Bliss*, 39 N. Y., 70; *Jones v. Smith*, 1 Hare, 55; *Le Neve v. Le Neve*, Amb., 436; *Miles v. Langley*, 1 R. & Myl., 39; *Rogers v. Jones*, 8 N. H., 264; *Nutting v. Herbert*, 37 id., 346.) If no actual knowledge of facts is shown, it must appear that the party willfully neglected inquiry to avoid information to an extent to show fraud. (*Kellogg v. Smith*, 20 N. Y., 18; *Baker v. Bliss*, 39 id., 70; *Curtis v. Munday*, 3 Metc., 405; *Doyle v. Tras*, 4 Seam., 202; *Holmes v. Stout*, 2 Stockt., 419; *Dey v. Dunham*, 2 J. Ch., 182; *Jackson v. Burgot*, 10 J. R., 462; 1 Story Eq., § 397.)

*Samuel Hand* for the respondent. The actual possession of the premises by defendant, under the contract with Decker, was notice to all of all his equitable rights in and title to the premises. (*Moyer v. Hinman*, 3 Kern., 180; *Bk. of Orleans v. Flagg*, 3 Barb. Ch., 316; *Tuttle v. Jackson*, 6 Wend., 213-226; *Gouverneur v. Lynch*, 2 Paige, 300;



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*De Ruyter v. Trustees, etc.*, 2 Barb. Ch., 555; *Trustees, etc. v. Wheeler*, 59 Barb., 585; 4 Kent's Com. [2d ed.], 203; *Laverty v. Moore*, 33 N. Y., 658.) It was not necessary that there should be a living in and dwelling upon the premises. (*French v. Carhart*, 1 Comst., 107; *Harsha v. Reid*, 45 N. Y., 418.) It was not necessary that the possession of the equitable owner must be known by the purchaser. (6 Wend., 226; 2 Paige, 300; 2 Barb. Ch., 558; 5 Barb., 533-548; 59 id., 616, 617.)

ALLEN, J. The findings of fact by the learned judge by whom the action was tried are equivocal. Read as a whole, they only imply of necessity a constructive possession of the premises, a mere power over them by the respondent. They come far short of showing an actual use and occupation by him. The delivery of the possession to him by Decker was symbolical, by a surrender of the keys of the house, and the actual and exclusive possession, and the expenditure of moneys in making alterations and improvements in the house as stated in the findings, must be regarded in the connection in which the statements are found, as but the continuance of that constructive possession commenced and evidenced by the delivery of the keys. The cautious finding or statement of the judge that such possession, so continued, could have been easily ascertained by the appellant by inquiry on said premises, without indicating that there was an actual occupant of whom such inquiry could have been made, tends strongly to show that the learned judge used the word possession, as distinct from that of actual occupation, and in its strictly technical sense. Possession means simply the owning or having a thing in one's own power; it may be actual, or it may be constructive. Actual possession exists where the thing is in the immediate occupancy of the party; constructive is that which exists in contemplation of law, without actual personal occupation.

Had the judge intended to find an actual, visible occupation of the premises by the respondent, he would, with his



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usual accuracy, have so found, in terms, and not by argument found a possession merely, which from the circumstances stated as establishing such possession, show a constructive possession, as that term is understood in the law. If the evidence is referred to, to give effect to the findings and judgment, it entirely fails to establish any thing more than the merest constructive possession in the respondent, and that of a very doubtful character. So that, while in cases where the findings of fact are doubtful and may be insufficient unexplained, to sustain the judgment, the evidence may be resorted to in aid of the interpretation and in support of the judgment; a reference to the testimony in this case shows that a finding of actual and visible occupation, such an occupation as is required (as well in law as in equity) to break in upon the registry laws, would have been without evidence and erroneous.

The testimony, viewed in its most favorable light for the respondent, shows that he did not at any time accept the house from Decker, his grantor, as finished and completed until long after the mortgage to the plaintiff; that until late in the fall he was urging Decker to complete the house as he had agreed, and complaining that it was not done, and did not accept the deed thereof until November. The work which he did upon the house after the delivery of the keys in June, was performed by mechanics and laborers, and substantially in the execution of his agreement with Decker, for work upon the nineteen houses which Decker was building, including the one upon the mortgaged premises. The fact that the work put upon the house in question by the respondent, was of a better character and more expensive than was put upon the other houses, or than he was bound to put upon this, did not vary the character of the act, or give any particular significance to it as affecting the plaintiff, or third persons. Whether Decker had or had not men at work upon the house during the same time may be doubtful upon the evidence, and the fact is not found. The only possession of the respondent was by having laborers and mechanics at work

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upon an unfinished house, one of a block of nineteen houses, the record title to which was in Decker, and to which the respondent had no paper title, with nothing to indicate any difference in the proprietorship or the direction of the work between this house and any of the other eighteen houses. There was no one remaining or staying permanently in the house until long after the giving of the mortgage to the plaintiff. It was an unfinished and unoccupied house.

In view of the undisputed evidence, and of the peculiar language of the findings of fact, we are constrained to hold that an actual, visible occupation of the premises by the respondent, was neither proved or found, and had the fact been so found by the judge it would have been error for which the judgment would have been reversed. The protection which the registry law gives to those taking titles or security upon land upon the faith of the records, should not be destroyed or lost, except upon clear evidence showing a want of good faith in the party claiming their protection, and a clear equity in him who seeks to establish a right in hostility to him. Slight circumstances, or mere conjecture, should not suffice to overthrow the title of one whose deed is first on record. The statute makes void a conveyance not recorded only as against a subsequent purchaser in good faith and for a valuable consideration. (1 R. S., 756, § 1.) Actual notice of a prior unrecorded conveyance, or of any title, legal or equitable, to the premises, or knowledge and notice of any facts which should put a prudent man upon inquiry, impeaches the good faith of the subsequent purchaser.

There should be proof of actual notice of prior title, or prior equities, or circumstances tending to prove such prior rights, which affect the conscience of the subsequent purchaser. Actual notice, of itself, impeaches the subsequent conveyance. Proof of circumstances, short of actual notice, which should put a prudent man upon inquiry, authorizes the court or jury to infer and find actual notice. The character of the possession which is sufficient to put a person upon inquiry, and which will be equivalent to actual notice of

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rights or equities in persons other than those who have a title upon record, is very well established by an unbroken current of authority. The possession and occupation must be actual, open and visible; it must not be equivocal, occasional, or for a special or temporary purpose; neither must it be consistent with the title of the apparent owner by the record.

In *Moyer v. Hinman* (3 Kern., 180) the plaintiff was in actual possession of farming lands, under a contract of purchase, and that circumstance was held notice to all persons who had subsequently become interested in the premises, of all the plaintiff's rights under his contract. *De Ruyter v. The Trustees of St. Peter's Church* (2 Barb. Ch., 555) was a case of actual possession and use of the premises, and such possession was held constructive notice of the rights of the occupant. *Gouverneur v. Lynch* (2 Paige, 300) was like *Moyer v. Hinman* (*supra*). Chief Justice PARSONS, in *Norcross v. Widgery* (2 Mass., 508), says: "This notice may be express, or it may be implied from the first purchaser being in the open and exclusive possession of the estate under his deed." The same doctrine is held in *Colby v. Kenniston* (4 N. H., 262), and both cases are cited with approval by the chancellor in *Tuttle v. Jackson* (6 Wend., 213). In *The Bank of Orleans v. Flagg* (3 Barb. Ch., 316) it was held that the actual possession of the premises by the tenant of a purchaser was constructive notice to subsequent mortgagees of the equitable rights of such purchaser. I have met with no case in which any thing short of actual, visible, and as is said in some cases, notorious possession of premises, has been held constructive notice of title in a claimant. (See *Chesterman v. Gardner*, 5 J. Ch., 29; *Grinstone v. Carter*, 3 Paige, 421; *Cook v. Travis*, 20 N. Y., 400; *Webster v. Van Steenberg*, 46 Barb., 212.) All the cases agree that notice will not be imputed to a purchaser except where it is a reasonable and just inference from the visible facts. Neither will the principles of constructive notice apply to unimproved lands, nor to cases where the possession is ambiguous or liable to be misunderstood. (*Patten v. Moore*, 32 N. H., 382.) It should

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not apply within the same principle to an uninhabited and unfinished dwelling-house; there must be a possession actual and distinct, and manifested by such acts of ownership as would naturally be observed and known by others.

The using of lands for pasturage or for cutting of timber is not such an occupancy as will charge a purchaser or incumbrancer with notice. (*Coleman v. Barklew*, 3 Dutch., 357; *McMechan v. Griffing*, 3 Pick., 149; *Holmes v. Stout*, 10 N. J. Eq., 419; see also, *Fassett v. Smith*, 23 N. Y., 252.)

It cannot be said, either upon the cautious findings of the learned judge or upon the evidence, that the respondent was the open, actual occupant of the houses, either by himself or by tenants, or that there were any open, visible acts of ownership, by the respondent, of the mortgaged premises, which the public or third persons would be likely to notice, or which would suggest an inquiry into his claim, or which would evince bad faith or gross neglect should a party dealing in respect to the premises neglect to make inquiry.

The judgment should be reversed and a new trial granted.

To obviate an objection suggested by the learned counsel for the appellant, and which may be made upon a second trial, although not made before, it is proper to state that Volkening was a proper party defendant, and his rights can properly be determined in this action. Whether his equities are prior and superior to the rights of the plaintiff under his mortgage, or junior and subordinate thereto, must necessarily be determined in the judgment for a foreclosure of the plaintiff's mortgage. (*Bank of Orleans v. Flagg*, *supra*.) Volkening is not contesting the title of the mortgagor, but simply asserts a right under him prior in point of time to the mortgage. The question of priority between the two is necessarily involved in the action, and proper to be determined in it.

CHURCH, Ch. J., RAPALLO and MILLER, JJ., concur. ANDREWS and EARL, JJ., concur in result, on the ground that the evidence does not warrant a finding of actual and exclusive occupation by Volkening prior to or at the time plaintiff's mortgage was executed. FOLGER, J., dissents.

Judgment reversed.

## Statement of case.

THE STANDARD OIL COMPANY, Appellant, v. THE TRIUMPH  
INSURANCE COMPANY, Respondent.

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| 127 | 620 |
| 64  | 85  |
| 148 | 277 |

An insurance broker employed by a party to effect insurance for him may be regarded by the insurer as clothed with full authority to act for his principal in procuring, modifying or canceling policies; and his acts in these respects are binding upon his principal.

In an action upon a policy of fire insurance defendant claimed and proved that the policy was surrendered to defendant for cancellation and was canceled before the loss. Plaintiff claimed that such surrender was by mistake. The court, before whom the action was tried, did not find as a fact the mistake claimed, but in the conclusions of law, held that the return of the policy indorsed for cancellation, although by mistake, would defeat the action. Upon settlement of the case plaintiff's counsel requested the judge to find the mistake; this he refused to do. The evidence as to the mistake was not conclusive. *Held*, that upon the report itself the conclusion of law could not be disturbed as it could not be determined therefrom that the court would have found a mistake; that the subsequent refusal so to find was equivalent to a finding against the fact; but if regarded as a refusal to find either way the remedy of the party was by motion to compel a finding.

The policy was obtained by a broker employed by plaintiff. It contained a clause giving defendant power to raise the rate of insurance. Defendant's agent notified the broker that it would raise the rate one per cent. The broker assented and agreed to bring the policy to have it indorsed thereon; this he did not do. Defendant was allowed to prove, under objection, the custom among brokers in the city to consider the matter concluded, unless such indorsement was made, allowing a reasonable time to bring the policy for that purpose. *Held*, no error.

Defendant was permitted to show entries upon the broker's book showing the cancellation of the policy. These were objected to unless evidence was given showing that plaintiff had knowledge of them. The objection was overruled. *Held*, no error; that the evidence was competent as bearing upon the question of mistake and upon the credibility of the broker and his clerks, who were witnesses for plaintiff.

(Argued January 20, 1876; decided February 1, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of defendant entered upon a decision of the court on trial without a jury. (Reported below, 3 Hun, 591; 5 T. & C., 300.)

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This action was upon a policy of fire insurance. The court found the following facts, among others: That the plaintiff, The Standard Oil Company, employed the Lords, who were brokers in New York city, to secure from the defendants a policy of insurance for \$5,000 on its, plaintiff's, property, situate in Kings county; that said Lords were plaintiff's agents for said purpose, and were also plaintiff's agents generally for placing and keeping upon plaintiff's property a large line of insurance. That defendant's agents, Messrs. Burlingame & Rankin, issued said policy May 31, 1872, fixing the premium at the rate of five per cent, and reported the same to defendant at its home office at Cincinnati, Ohio. That it was one of the express conditions of said policy that "if the company shall so elect it shall be optional with the company to cancel this policy, which shall cease on notice being given to the assured, or his or their representatives, of its decision to do so."

It was also another express condition of said policy, that "no insurance, or renewal thereof, shall be considered binding until the actual payment of the premium." No premium was ever paid to defendant or its agents, but plaintiff's agents had an open account with defendant's agents, in which, by an agreement between them, they, plaintiff's agents, entered at the time the policy was issued a credit to defendant's agents of five per cent, which was assented to as satisfactory by the latter, settlements being made between said agents every thirty days. Defendant's agents received instructions from it to have the premium raised to six per cent or cancel the policy; that these instructions were repeated to plaintiff's agents, the Lords, sometime in June, 1872, when said agents of plaintiff assented to said increased rate and agreed to bring the policy to the defendant's agents and have the increased rate indorsed thereon. It was a well known custom and rule with insurance brokers and agents in New York and Brooklyn that where the rate of premium had been increased upon the policy the same must be indorsed upon the policy before the same, under the increased premium, becomes binding.

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No entry of the increased premium was made or credit given by the Lords on their books, at the time when the notice was given, that the rate of premium must be increased to six per cent or the policy canceled, or at any time; and the increased premium of one per cent was never paid, tendered or credited by plaintiff or its agents; the Lords never brought the policy to have the increased premium indorsed thereon, and the same never was indorsed upon the policy.

On the twenty-fifth July a messenger from the Lords' office brought said policy to the agents of the defendant, at its office in Brooklyn, saying: "It is returned for cancellation," and defendants' agents received and filed it as a canceled policy. On the policy, in the handwriting of one of the Lords, are these words, "Ret. Co.," which signified "return to the company;" that "Ret. Co." was synonymous with "cancel the policy" in the language and customs of Lords' office. They were used as synonymous terms; that in all of Lords' books the policy on the said twenty-fifth day of July was entered by a clerk of the Lords as canceled, the amount of the original five per cent premium credited back to defendants' agents, and an entry made in said books that the premium was to be returned to plaintiff.

On the thirtieth day of July the plaintiff's property covered by this policy took fire and burned up.

The evidence as to the custom of brokers in case of increase of rate of premium, and as to the entries on the Lords' books, was received under objection and exception. The latter was objected to, unless evidence was given showing that the entries were brought to plaintiff's knowledge.

The court found as conclusions of law the following, among others:

"Without passing upon the question of fact as to whether the agents of the plaintiff intended to cancel the Triumph policy or not, by all that was done by and through them in that behalf, and even if I assume that there was a valid existing contract of insurance prior to the old policy being returned, and that the defendant had waived a payment of the increased



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premium and an indorsement of the change upon the policy (and as to this latter assumption the proof was quite the reverse), yet the fact that the policy was returned indorsed for cancellation, although by mistake, and permitted to remain in possession of defendants' agents as a canceled policy until after the fire, is enough to defeat this action.

Assuming that all that was done by the agents of the plaintiff in the return and cancellation of the policy was done by mistake, yet through the negligence and mistake, then, of the plaintiff's agents the defendants' position was altered.

Had this not occurred, the defendants might have procured this policy to be underwritten, used greater diligence in examining the risk, and perhaps have exercised its right to increase the premium or cancel the policy.

There are other grounds equally and perhaps more satisfactory upon which this complaint should be dismissed, but it is unnecessary to allude to them at this time, the decision here being put upon the ground that the plaintiff must bear the loss because it was occasioned by a mistake of its own agent."

Upon the settlement of the case the plaintiff's counsel requested the judge to find that the policy was returned for cancellation by mistake; this he refused to do.

*Samuel Hand* for the appellant. Payment of the premium by the broker to the company was not necessary. (*Angell v. Hart. Ins. Co.*, 59 N. Y., 172; *Sheldon v. At. Ins. Co.*, 26 id., 460, 465; *Boehm v. Williams Ins. Co.*, 35 id., 131; *Post v. Aetna Ins. Co.*, 43 Barb., 351; *Chase v. Ham. Ins. Co.*, 22 id., 527; *Train v. Hol. Ins. Co.*, Ct. Apps., 1875.) There was no sufficient cancellation of the policy. (*Hathorne v. Ger. Ins. Co.*, 56 Barb., 28; *McLean v. Repb. Ins. Co.*, 3 Lans., 42; *Post v. Aetna Ins. Co.*, 43 Barb., 351.) The modification of the original written agreement as to rate, though by parol, was good and binding. (*Rhodes v. Ins. Co.*, 5 Lans., 71; *Kelly v. Ins. Co.*, 10 Bosw., 82; 9 Cow., 115; 4 Barb., 614.) Evidence of usage of bro-



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kers was inadmissible, and the usage itself void and not binding on plaintiff. (*Allen v. Dykers*, 3 Hill, 503; *Higgins v. Moore*, 34 N. Y., 425; *Callender v. Dinsmore*, 55 id., 200; *Lawrence v. Maxwell*, 53 id., 19; *Bradley v. Wheeler*, 44 id., 495; *Ripley v. Ins. Co.*, 30 id., 160; *Sipperly v. Stewart*, 50 Barb., 62; *Boardman v. Gaillard*, 1 Hun, 217; *Wheeler v. Newbold*, 16 N. Y., 192.) Plaintiff was not estopped by the mistake of the broker's clerk. (*Kingston Bk. v. Eltinge*, 60 N. Y., 391; *Roberts v. Fisher*, 43 id., 159.)

*James Emott* for the respondent. Entries in the books of defendant's agent in reference to the cancellation of the policy were properly received in evidence, the agent's knowledge being the knowledge of his principal. (*Bk. of U. S. v. Davis*, 2 Hill, 451; *Sutton v. Dillaye*, 3 Barb., 529; 13 Wend, 518; *Vail v. Rice*, 1 Seld., 155; *Goodall v. N. Eng. F. Ins. Co.*, 5 Foster [N. H.], 169.) Plaintiff must bear the loss, it having been occasioned by the mistake of his agent. (Story on Ag., §§ 134, 135, 451, 452; 1 Greenl. Ev., § 113; *Sharp v. Mayor*, 40 Barb., 256; *Jeffrey v. Bigelow*, 13 Wend., 518; *Anderson v. Coonley*, 21 id., 279; 3 Duer, 241; 44 Barb., 471; 45 id., 611; *Xenos v. Wickham*, 13 C. B. [N. S.], 381.) The company had the right to cancel the policy within reasonable time after notice of the increase of premium. (*McLean v. Repb. F. Ins. Co.*, 3 Lans., 421.)

CHURCH, Ch. J. The case is presented by the record in a somewhat unusual manner. The learned judge arrived at a conclusion of law upon the assumption of facts which he did not find, and which afterwards, upon the settlement of the case, upon being specifically requested, he refused to find. The general fact thus assumed, but not found in the original report, and which the judge afterwards refused to find upon request, was, that the policy upon which the action was brought was returned for cancellation by mistake. This is the vital fact to sustain the plaintiff's action. The broker, Lord, must be regarded as the plaintiff's agent. The defend-

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Opinion of the Court, per CHURCH, Ch. J.

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ant's agents so regarded him, and were justified in regarding him as clothed with full authority to act for the plaintiff in procuring, modifying or canceling the policy in question, and his acts in respect to the policy are the same as if done by the plaintiff. (106 Eng. Com. Law, 381; 13 Wend., 518; 21 id., 279; Story on Agency, §§ 134, 135, 451, 452; 35 Barb., 463.)

The fact is found that, after procuring the new policy for \$10,000 from the Amazon Company, Lord returned the policy in question to defendant, with instructions to cancel the same, and that it was accepted and treated as canceled. If this was not done by mistake, it was final upon the parties, and there is no ground upon which the action can be maintained. If the case had been presented upon the original report of the judge, there would have been some plausibility for asking this court to assume the same facts which the judge did. The general rule is, that every presumption is to be indulged in favor of a judgment, and that this court will not look into the evidence to find a fact for the purpose of reversing a judgment. A party who relies upon facts not found has ample remedy. He may request a finding as to such facts, and if they are conclusively proved, an exception to a refusal to find will be available; if not conclusively proved, a motion may be made to the court below to compel a finding, and a denial of such a motion is reviewable on appeal to this court.

We could not determine from the original report that the judge would have found a mistake in returning the policy, and it is difficult to see how we could have disturbed the conclusion of law upon the report itself. This difficulty is greatly increased by the refusal afterwards to find the fact when specifically requested. I understand this refusal to be tantamount to a finding against the fact, but if it is regarded as a refusal to find either way upon the question, then the remedy of the party was by motion to compel a finding one way or the other. It cannot be claimed that the fact was conclusively proved. A decision or verdict against the fact

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would not be set aside as against evidence. It depends upon the credibility of witnesses, and upon inferences to be drawn from the acts and conduct of the parties, as to which honest men might differ. We are called upon to assume the alleged fact of mistake to be true. I am not aware of any rule or precedent justifying this court in reversing a judgment upon a fact which a judge or referee has expressly refused to find, and which is not conclusively proved. Upon all the facts found, the result arrived at was clearly right. Nor do I find any error committed on the trial.

The evidence of a custom among those engaged in insurance business was not inadmissible. It was competent, at least, to explain the conduct of the parties, and how they regarded the verbal arrangement for an increase of premium, and the acts necessary to be done to consummate it. So the entries made upon Lord's books were competent as bearing upon the fact of a mistake, and upon his credibility and that of his clerks.

It is not intended to intimate an opinion adverse to the decision of the court below upon the assumption that a mistake was committed in returning the policy. The case is not in a situation justifying this court in assuming the fact, and it is therefore unnecessary to pass upon the legal question.

The judgment must be affirmed.  
All concur.  
Judgment affirmed.

JOHN L. WEISMER, Appellant, v. THE VILLAGE OF DOUGLAS,  
Respondent.

The legislative power of taxation, at least as regards the purposes for which it is to be exercised, is not without limit, and it is within the province of the courts to examine and to determine whether, in a particular case, the extreme boundary of legislative power has been reached and passed; it must be made quite clear, however, that the legislature has erred before the court can interfere with its action.

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| 64  | 91  |
| 121 | 81  |
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| 165 | 526 |
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| 166 | 20  |
| 166 | 495 |
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| 168 | 88  |

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The legislature has not power to authorize a municipal corporation to issue its obligations for the purpose of raising money wherewith to pay a subscription of said corporation to the capital stock of a private corporation, and to provide for the payment of such obligations by taxation; it has not power to tax for private purposes solely.

Accordingly, *held*, that the act (chap. 577, Laws of 1868) purporting to authorize defendant to subscribe for and take capital stock of the L. E. H. and M. Co., to issue its bonds to raise money to pay for such stock, and to collect by taxation the moneys to pay said bonds, was unconstitutional and void, and the bonds issued thereunder invalid.

The *Town of Guilford v. Supervisors of Chenango* (13 N. Y., 148) distinguished and limited.

A municipal corporation is not estopped from asserting the invalidity of its bonds, by any conduct of its officers or agents, or by acts of acquiescence and approval on the part of the inhabitants of the municipality, after knowledge of the facts.

*Allegheny City v. McClaskan* (14 Penn., 81) questioned.

(Argued January 21, 1876; decided February 1, 1876.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, in favor of defendant, entered upon an order reversing a judgment of Special Term in favor of plaintiff, and directing judgment for defendant. (Reported below, 6 T. & C., 514; 4 Hun, 201.)

This action was brought to recover the interest due upon certain bonds issued by defendant under the act (chap. 577, Laws of 1868), authorizing defendant to take stock, not exceeding \$10,000, in the Long Eddy Hydraulic and Manufacturing Company, upon certain conditions therein specified, and to issue bonds to raise the money to pay for such subscription, and to levy and collect taxes for the payment of the principal and interest on said bonds.

The court found the following facts among others:

“The Long Eddy Hydraulic and Manufacturing Company, since the 15th of February, 1867, has been and is a corporation aggregate, incorporated and organized under the general laws of this State, and having its place of business at the said village of Douglas, formed for the object of constructing and

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improving a water privilege on the Delaware river at the said village, and for the purpose of manufacturing lumber, etc., thereon.

“The said Delaware river, at the point above specified, is a public highway, largely used and navigated as such by the public in running thereon to market rafts of lumber, logs and timber, which are the principal productions of the surrounding section of country.

“By an act of the legislature of this State, entitled ‘An act to authorize the building of a dam across the Delaware river at the village of Douglas, Sullivan county, New York,’ passed May 9, 1867, the said Long Eddy Hydraulic and Manufacturing Company was authorized, upon compliance with certain conditions therein specified, to erect, build and maintain a dam across the said Delaware river, in the town of Fremont, Sullivan county, between the county of Sullivan, in the State of New York, and the county of Wayne, in the State of Pennsylvania, at a point to be fixed on by said company, and for that purpose, under certain restrictions therein imposed, and upon making due compensation therefor, to take and flow such lands as should be necessary or convenient to enable the said company to accomplish the object of its incorporation.

“The objects and purposes of said company were not strictly or exclusively of a private nature, but, to some extent, partook of a public character, and were sufficiently broad and extended to include a public use, and the material growth and prosperity of the said village would have been largely increased by the accomplishment of the objects of said company, as it would have added a large tax-paying element thereto, increased the value of the adjacent property, and furnished an extensive manufactory for lumber and other raw products, and the public might have been benefited, and the convenience of public business promoted by the cleaning out the channel of said river and the construction of docking and piers on the bank of the same, which would have come within the apparent objects and purposes of said company.”

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The court also found that, under authority conferred by said act, the officers of defendant subscribed for stock of said company to the amount of \$10,000, and to that amount issued and signed bonds, of which the bonds in question form part. The bonds were denominated upon their face, "Internal Improvement Fund of the village of Douglas," and recited that they were authorized by the said act of 1868. The first three installments of interest were paid by defendant.

As conclusions of law the court found, among others, that the objects of said Long Eddy Hydraulic and Manufacturing Company were to such an extent public as to justify the legislature in exerting its constitutional power of taxation in its behalf; that said act of 1868 was constitutional and valid, and that plaintiff was entitled to recover.

It appeared that the first installment of interest was paid by defendant, and its officers once voted on the stock.

Further facts appear in the opinion.

*D. D. Niles* for the appellant. The issue of the bonds by defendant was an exercise of the power of taxation, and not an exertion of the right of eminent domain. (*Town of Duaneburgh v. Jenkins*, 57 N. Y., 177; *People v. Mayor, etc.*, 4 id., 419; *Guilford v. Suprs. of Chenango Co.*, 3 Kern., 143; *Olcott v. Suprs.*, 16 Wall., 678.) The constitutional inhibitions against depriving a person of property without due process of law and taking private property for private purposes do not apply to property or money exacted by the power of taxation. (4 N. Y., 419; 3 Kern., 143; *Howell v. City of Buffalo*, 37 N. Y., 267; *Darlington v. Mayor, etc.*, 31 id., 189, 190; *Davidson v. Mayor, etc.*, 27 How., 342; *People v. Mitchell*, 45 Barb., 308; 35 N. Y., 551; *Bk. of Rome v. Village of Rome*, 18 id., 38; *Thomas v. Leland*, 24 Wend., 65; *Dillon on Munic. Corp.*, 686.) The right of the legislature to delegate to any of the municipal divisions of the State the authority to impose taxes is coextensive with its own power of taxation, and if the objects to which the proceeds of the tax are to be devoted are of such a

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character as to justify the legislature itself in promoting them by taxation, the act must be sustained. (2 Dillon's Munic. Corp., 687; *Bk. of Rome v. Vil. of Rome*, 18 N. Y., 38; *Loan Assn. v. Topeka*, 20 Wall., 655; *Clarke v. Rochester*, 13 How. Pr., 204; 24 Barb., 446; 26 N. Y., 471, note; *Bloodgood v. M. and H. R. R. Co.*, 18 Wend., 9, 31; *People v. Morrell*, 21 id., 576; *Cochran v. Van Surlay*, 20 id., 381, 382; *Butler v. Palmer*, 1 Hill, 324, 329; *Wynehamer v. People*, 13 N. Y., 378, 391; *Leggett v. Hunter*, 19 id., 445; *Darlington v. Mayor, etc.*, 31 id., 187; *Bk. of Chenango v. Brown*, 26 id., 467; *Town of Duaneburgh v. Jenkins*, 57 id., 177; *People v. Fisher*, 24 Wend., 215; *Grant v. Courter*, 24 Barb., 237; *Clarke v. Rochester*, id., 480; *People v. Draper*, 14 N. Y., 543; *Calder v. Bull*, 3 Dall., 386; *Thomas v. Leland*, 24 Wend., 65; 3 Kern., 143; *Brewster v. City of Syracuse*, 19 N. Y., 116; *Benson v. Mayor, etc.*, 24 Barb., 254; *Howell v. City of Buffalo*, 37 N. Y., 267; *People v. Lawrence*, 41 id., 123.) By proceeding under the act and accepting the benefits conferred by it, defendant has waived the right to question its constitutionality. (*Houston v. Wheeler*, 52 N. Y., 641; *Sherman v. McKeon*, 38 id., 266; *Embury v. Conner*, 3 id., 511; *Baker v. Braman*, 6 Hill, 47; *Vose v. Cockroft*, 44 N. Y., 415; *Van Hook v. Whitlock*, 26 Wend., 43; *People ex rel. v. Havemeyer*, 4 T. & C., 365; *Allegheny City v. McClurkan*, 14 Penn. St., 81.) Defendant, as against a *bona fide* holder, is precluded from asserting that the act is unconstitutional. (*F. and M. Bk. v. B. and D. Bk.*, 16 N. Y., 125; *Storey v. Am. L. Ins. Co.*, 11 Paige, 635; *Suprs. v. Schenck*, 5 Wall., 784; *Morford v. Farmers' Bk.*, 26 Barb., 568; *State of Indiana v. Woram*, 6 Hill, 33; *Moss v. Rossie L. M. Co.*, 5 id., 137; 5 Am. L. Rev., 272; 2 Dillon's Munic. Corp., 855.) Any fraud or irregularity in the issue of the bonds does not constitute a defence against a *bona fide* holder for value. (*Bk. of Rome v. Vil. of Rome*, 18 N. Y., 38; *Grand Chute v. Winegar*, 15 Wall., 355; *Lexington v. Butler*, 14 id., 282; *Mercer Co. v. Hackett*, 1 id., 83; *Gelpcke v. Dubuque*, id., 175; *Meyers v.*



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*Muscatine*, id., 384; *People v. Mitchell*, 35 N. Y., 551; 45 Barb., 208.) The fact that the date of the act was erroneously recited in the bonds was entirely immaterial. (*Judd v. Waddle*, 21 N. Y., 186; *Jackson v. Clarke*, 7 J. R., 216; *Dodge v. Potter*, 18 Barb., 193; *Fuller v. Acker*, 1 Hill, 473.)

*W. J. Welsh* for the respondent. The purpose for which the bonds were issued, and in aid of which a tax was to be levied, was a private use. (2 R. S. [5th ed.], 658; *Cit. Loan Assn. v. Topeka*, 20 Wall., 655; *Lowell v. Boston*, 111 Mass., 463; *Com. Bk. v. City of Iola*, 2 Dil., 353; *Allen v. Inhab. of Jay*, 60 Me., 124; *Brewer Brick Co. v. Brewer*, 62 id., 62; *Wooster v. West. R. R. Co.*, 4 Metc., 564; *W. R. Bridge Co. v. Dix*, 6 How. [U. S.], 546; *Bonaparte v. C. and A. R. R. Co.*, 1 Bald., 273; *Beekman v. Sara. R. R. Co.*, 3 Paige, 45; *Bloodgood v. M. and H. R. R. Co.*, 18 Wend., 21-60; *In re Townsend*, 39 N. Y., 184; *Hay v. Cohoes Co.*, 3 Barb., 47.) The legislature can neither directly or indirectly authorize taxation for a private use, or to aid a private manufacturing corporation. (*People v. Mayor of Bklyn.*, 4 N. Y., 422; Gerard's Titles to R. E., 736; *Lowell v. Boston*, 111 Mass., 462; *Varick v. Smith*, 5 Paige, 146; *Wilkinson v. Porter*, 4 Hill, 143; 2 Kent's Com. [10th ed.], 327; *In re Albany St.*, 11 Wend., 149; *Embury v. Conner*, 3 N. Y., 511; *People v. Norris*, 13 Wend., 328; *People v. Flagg*, 46 N. Y., 405; *Gordon v. Cornes*, 47 id., 612; *Sharpless v. Mayor, etc.*, 21 Penn., 168; *People v. Batchellor*, 53 N. Y., 143; *Olcott v. Suprs.*, 16 Wall., 678.) The courts may determine what is a private and what a public use. (4 N. Y., 419; 53 id., 143; *Sweet v. Hulbert*, 51 Barb., 312; Gerard's Titles to R. E., 32; Cooley's Const. Lim., 494; *In re Albany St.*, 11 Wend., 151; *Bloodgood v. H. R. R. Co.*, 18 id., 9; *Taylor v. Porter*, 4 Hill, 140; 5 Paige, 127; 3 N. Y., 511; Sedg. on Stat. and Const. Law, 511; *In re Townsend*, 39 N. Y., 174.) The subscription for the stock made no difference. (*Taylor v. Porter*, 4 Hill, 143;



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*Olcott v. Suprs.*, 16 Wall, 698; *Town of Venice v. Breed*, 1 N. Y. S. C., 136.) The payment of the interest worked no estoppel. (*Cit. S. and L. Assn. v. City of Topeka*, 20 Wall., 655.)

FOLGER, J. The main question in this case is, whether there was power in the legislature to pass the act, which ostensibly gave authority to the defendant to issue and negotiate its bonds, and with the moneys realized therefrom, to subscribe for and take shares of the capital stock of the manufacturing corporation. There was not, unless it is found in the power of taxation; and in the further right to delegate that power to a municipality, to be exercised by it, in a locality, and over a portion of the people, of the State. We shall look only to the power of taxation and the right to delegate it; although one of the acts of the legislature, which is in a degree involved in this case, is said to indicate the exercise by the legislature of the power of eminent domain, or a delegation of that power. The immediate authority given by the principal act is to issue and negotiate the bonds of the defendant, for the future payment of money. The ultimate resort, the only sure and absolute resort for the means of payment, must necessarily be taxation. The act indeed contemplates dividends to be obtained by the defendant from the capital stock taken by it, but with so little reliance thereon, that it makes explicit, minute and elaborate provision, for taxation to meet the interest and principal of the bonds. The practical result of the actings of the defendant, its officers and agents, under the statute has been, that no payment of interest has been made save by moneys raised by taxation. The case shows that by that means alone will the bonds ever be paid by the defendant.

Now it is quite true, that there are opinions given in adjudications upon this general subject, which go to great length in declaring the extent of the legislative power of taxation, and which, if taken in all the scope of the sentiments uttered, seem to permit an extension of it without limit, and to deny

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any judicial power to fix a bound to it, or to question in any case the legislative right to exercise and delegate it. Perhaps the most noted of these in this State, and which may be taken as an example of all, is in the case of *The Town of Guilford v. Supervisors of Chenango County* (13 N. Y., 143). It is a case very familiar to our bench and bar, and some of the views expressed in it have the sanction of a great judicial name and reputation. It is there asserted that the legislature can determine what sums shall be raised by taxation, and the purposes to which the money shall be applied; that it can recognize claims founded in equity and justice in the largest sense of those terms, or in gratitude or charity; and (what seems to press more upon us here) that, independent of any express constitutional restrictions, it can make appropriation of money whenever the public well being requires or will be promoted by it, and that it is the judge of what is for the public good. Other cases preceded or followed that, with more or less closeness to utterance of the same doctrine.

It is not needed that we now deny that there is no limitation whatever upon the legislative power to tax, considered as to the amount which shall be raised thereby, and the subjects from which it shall be raised, unless a limit is found in express constitutional restrictions. The reliance of the people against excessive taxation, unjust in the application of it to the thing taxed, must be in the character of their legislative representatives, and their remedy when that reliance fails must be found in the power to displace and change them at recurring intervals.

When, however, we come to deal with the power of taxation in reference to the purposes for which it is to be exercised, we may not admit so much. It cannot but be conceded that there is an end to it somewhere. Every mind must be able to conceive of some legislative attempt to exercise this great and extensive power, which would fail to find warrant either in our written Constitution or in any inherent governmental authority, and which the owner of property subjected to it would have a right to resist. To use the not uncom-

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mon illustration, it must be far beyond the reach of real legislative authority to take the property of A, or of A and some, many, or all others, and give it to B, when there is no legal, equitable, just or moral obligation to render unto B one farthing. But to tax A and the others to raise money to pay over to B, is only a way of taking their property for that purpose. If A may of right resist this, as surely he may, how is he to make resistance effective and peaceable save through the courts, which are set to be his guardians? How may the courts guard and aid him, unless they have the power, upon his complaint, to examine into the legislative act, and to determine whether the extreme boundary of legislative power has been reached and passed? So that the legislature is not sole, supreme and unrestrainable therein, and the courts are not debarred; but may, as a co-ordinate branch of the government, scrutinize and measure the legislative act; always keeping in mind, that the legislature is the primary authority which is to inquire, what is a proper purpose for the application of money to be raised by taxation, and the necessity of taxation to subserve it, and that it must be quite clear that it has erred before the courts can arrest the consequences of its action.

Nor are the courts without some rule to guide them in their scrutiny. It is a general rule that the legitimate object of raising money by taxation is for public purposes and the proper needs of government, general and local, State and municipal. When we come to ask, in any case, what is a public purpose, the answer is not always ready, nor easily to be found. It is to be conceded that no pinched or meager sense may be put upon the words, and that if the purpose designated by the legislature lies so near the border line as that it may be doubtful on which side of it it is domiciled, the courts may not set their judgment against that of the law makers. And hence it is that, though the case above cited (13 N. Y.) has been commented upon, and some of its utterances criticised (Dillon on Munic. Corp., p. 90, § 44, note 2; Cooley on Const. Lim., \* 380, note 1, 490, note 2;

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Sedgw. on Const. and Stat. Constr., \*313, \*314), the judgment there rendered upon the facts there exhibited has not been met with a disapproval, authoritative upon us. It has been accepted in this State as a binding adjudication, that the legislature may tax, or delegate to a political division of the State the power to tax, or may compel that division to tax, to raise money to pay a legal, equitable or moral claim, or to do that toward an individual which proper and expected sense of gratitude for public service ought to prompt, or a feeling of charity (which, in a legal sense, is, perhaps, as used here, no other than moral obligation), urge. It may also be conceded that that is a public purpose, from the attainment of which will flow some benefit or convenience to the public, whether of the whole commonwealth or of a circumscribed community. In this latter case, however, the benefit or convenience must be direct and immediate from the purpose, and not collateral, remote or consequential. It must be a benefit or convenience which each citizen of the community affected may lay his own hand to in his own right, and take unto his own use at his own option, upon the same reasonable terms and conditions as any other citizen thereof. He may not be made to depend for it on the spontaneous action of others, or to receive it in uncertain degree or manner or roundabout way, or hampered with discriminating distinctions and conditions.

In this spirit we will look at the legislation that is involved in this case. The authority to the defendant is to issue its bonds and exchange them for money, and with the money to pay the defendant's subscription to the capital stock of the Long Eddy Manufacturing Company. The purpose then to be achieved was to be reached through that company, and by the use of its corporate powers and the privileges conferred upon it by any special act of the legislature. Those corporate powers are expressed in the certificate of its incorporation, made and filed in pursuance of a general law. They are to construct and improve a water privilege on the Delaware river, and to manufacture lumber, "etc," thereon.

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After the incorporation of it, power was given to it to build a dam across that river, with certain restrictions. It must be plain that there is nothing in the fact of this body being a corporation that brings any factor into the problem. Any individual, or partnership of individuals, with the requisite capital, could do all that this corporation proposed to do, or had corporate power or privilege to do, and with the same results to the public. If done by an individual or by a copartnership, the public and each member of it as a member of it only, would have just as much use and interest in it, and just as much benefit from it, as if done by the corporation. In either case it would be a private business, to be carried on for private profit, to be controlled by private rules, or even private caprice, into which the public or any member of it could not enter, the direct conveniences and benefits whereof neither the public nor any member of it could demand as of right. No member of the community could insist that he would, at any time or some time, in accordance with rules operating alike upon all, have personal use of the water privilege, or have his saw-logs made into lumber. The corporation could refuse him at any time and at all times. Indeed, they could at any time suspend the use of, or altogether abandon their constructed and improved water privilege, and the manufacture of lumber for themselves or for the public, and no one, not of their body, could compel to the contrary. It is not as a highway or as a public canal upon which any one may enter with his own vehicle or craft, nor as a public school or a public free-seated meeting-house, to which any one may go or send, nor even as a railroad upon which any one has a right to be carried. It is a private undertaking for private business and profit. The use of it to the public is secondary to that, and tributary to that; the benefit to the public is remote and consequential. So, too, the authority to dam the Delaware could as well have been given to an individual or a copartnership, and the results to the public are as far from being direct. The act conferring that authority does not, in its terms, indicate any public use

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or purpose in the building of the dam. The corporation is restricted in the building of it, so that it shall be so made as not to interfere with the running of rafts in the river, and the certificate of two judicial officers that it will not have that effect is a prerequisite to the erection of it, and the height of it is to be prescribed by them. As this is the only mention of any public use and purpose in the act, and as this is named to be guarded from interference, it is not too much to say that the inference from the act itself is, that the legislature did not look upon the enterprise as other than private, for the private benefit of the corporation which received it. It is suggested that it gives a power to flow lands of private owners along the river, and to estimate the amount of compensation to them therefor by the appraisal of commissioners; and that hence it is to be inferred that the legislature perceived a public purpose. It does give the corporation the right to purchase, receive and hold, such real estate as may be necessary and convenient for the company to accomplish the object for which it was incorporated, and as is liable to be flowed by reason of the erection of the dam. Here is no power to take lands from an unwilling owner, or to flow his lands. The authority given is only to purchase, and to receive and hold that which is thus got. The provision for commissioners to appraise the damages of any owner of lands flowed is for a case in which the owner does not resist the flowing, but claims for the damages resulting from the act. There is nothing in the act, to our apprehension, which would prevent the owner of lands flowed, or likely to be flowed, from restraining the continuance or commencement of the act of flowing them. It is simply an act conferring the right to purchase and hold real estate for certain purposes, and which creates a tribunal to which the owner of the lands and the corporation may submit the claim for damages arising from any flowing. There is not provision in it to compel any owner to part with his land, nor to submit to the award of the commissioners. There is no final order to be made by the Supreme Court until payment has been made of the dam-

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ages awarded. Payment could not be made unless it was taken by the owner, and he was not bound to take it unless willing so to do. The operation of the act depended upon the will of each one owning lands affected. So that there is in it no exercise by the legislature of the right of eminent domain, nor any delegation thereof.

There is not to be discovered in the powers obtained by the certificate of incorporation, or by the last act mentioned, any public use or purpose, more than is found in the setting on foot of any business or industry in a community by private parties. Any such enterprise tends indirectly to the benefit of every citizen by the increase of general business activity, the greater facility of obtaining employment, the consequent increase of population, the enhancement in value of real estate and its readier sale, and the multiplication of conveniences. But these are not the direct and immediate public uses and purpose to which money taken by tax may be directed. We may well adopt the *obiter dictum* of GROVER, J., in *The People ex rel. v. Batchellor* (53 N. Y., 128, 143): "I think it would not be claimed that a town could be compelled to become a stockholder in a banking or *manufacturing* corporation, although it appeared that the particular corporation would largely promote the public interest where the business was conducted. Such legislation could only be sustained by holding the power of the legislature supreme over municipal corporations for private as well as public purposes. Upon principle and authority, I think that it is not as to the former, although it is as to the latter." Add to that, that the legislature may not empower a majority to compel a minority to enter into a private business, whether the form of effecting the end be by a direct statute or through the operation of taxation.

It is suggested that the findings of the Special Term are such as that this court may not inquire whether or not there was a public purpose. It is plain that the learned justice at Special Term was not willing to find as a fact without qualification, that the objects and purposes of the



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Long Eddy Manufacturing Company were public. He says they were not exclusively and strictly of a private nature, but to some extent partook of a public character, were sufficiently broad and extended to include a public use. Had he stopped with this generality the finding would have been stronger. But he explains how this general finding is reached, by the particulars which he gives. In reality the particulars are the findings of fact, and the generality is a conclusion of law from them. The conclusion is not warranted by the particulars. They are those consequential, indirect and remote results which we have above commented upon as not that public use and purpose which warrants taxation to effect them. But there is another quite as grave reason why this finding is of no avail. The defendant duly excepted to it. An examination of the case fails to disclose the testimony which will of itself, or by any legitimate inference from it, afford ground for the finding. Such a finding is an error of law; and what is more to the purpose in this discussion, it fails to affect an appellate court on review of the judgment.

The very able and ingenious argument presented by the learned counsel for the appellant presents a point which we think is novel; it is this: The Constitution (art. 1, § 9) forbids the legislature from appropriating public moneys for local and private purposes, save by a two-thirds vote; the prohibition implies the assent of the Constitution, that the appropriation may be made with a two-thirds vote. But as an appropriation must take from the treasury, the treasury must be supplied again, and can, as a rule, be supplied only by taxation. Then, (runs the argument of counsel), taxation for private purposes is, impliedly, recognized and validated by the Constitution. Should this be granted, it still remains to find the right, in or out of the written Constitution, to delegate a power to appropriate for a local or private purpose. The implication cannot be broader than the terms of the prohibition. It is the legislature only that can appropriate to a local or private purpose. And it is of public moneys



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only, moneys already at or before appropriation become public; raised for public use by legitimate taxation to that end, and any deficit in them to be supplied only by legitimate taxation. The argument is not sound, and will not sustain a statute for the imposition of a tax, the money derived wherefrom is at once, upon collection, by the terms of the same statute, to be paid out for a private purpose. And it comes back to the same question: can the legislature impose a tax for a private purpose, or singly and directly, to replace in the treasury moneys bestowed by it upon a private purpose? We think not.

It is urged that there has been worked an estoppel, preventing the assertion by the defendant of the invalidity of these bonds. It is conceded by the appellant that where an act is beyond the scope of corporate power a municipality cannot be debarred from raising that objection by any subsequent conduct of its officers and agents. But it is contended that the inhabitants of the municipality may be estopped and bound by acts of acquiescence and approval, after knowledge of the facts, and that their acts may thus affect the corporate body of which they are the elements.

The municipality is the defendant here. The inhabitants are not parties to the suit nor to the bonds. Though the inhabitants of a place be incorporated, they are not the corporate body; the very object of the incorporation is to form a legal body, not to be affected in its duration by a change among the constituent parts of it. If it should be granted that the inhabitants may be estopped, that cannot affect the defendant; it, is a political entity quite different and apart from the varying multitude who are from time to time the inhabitants of the territory within its corporate bounds. Their acquiescence cannot affect it. And if every one of the inhabitants of the village of Douglas who were *sui juris* at the time when these bonds were issued, or at the time when the payments of interest were made upon them, had joined affirmatively in all those acts, that could not conclude the present population as a body, some of whom have,

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doubtless, come in since then, or come to majority since then, or in many other ways now come into the category of inhabitants.

The case of *Allegheny City v. McClarkan* (14 Penn. St., 81) does not commend itself to our judgment in all the doctrine there advanced. Perhaps it may be sustained under the particular statute there in question, or one like it. It is not an authority or a precedent for the case now in hand. The doctrine in *Thomas v. City of Richmond* (12 Wall., 349) is more agreeable to our judgment.

The case of *The People ex rel. v. Havemeyer* (4 N. Y. S. C. [T. & C.], 365), it would be improper to discuss at length at present. We are not sure that it has not been appealed from. It is sufficient to say that the facts of that case are quite different from those here, and that the discussion in the opinion there delivered does not change the views we here express. Nor is the position tenable that the bonds, upon the face of them, assert that they are for a public purpose. Though they bear the words "Internal Improvement Fund," they also declare that the debt represented by them is authorized by a certain act of the legislature, to which reference is had by date and title. Thus is one about to take them put upon inquiry. And a reference to the session laws would fail to show any act of that date authorizing the debt, or would inform for just what purpose and in just what manner and on what prerequisites they were to be issued.

We come to the conclusion that the bonds sued upon are without validity against the defendant.

Other questions raised by the points of the respective counsel need not be noticed.

The judgment of the General Term should be affirmed.

All concur.

Judgment affirmed.

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Statement of case.

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GEORGE D. LORD et al., Appellants, v. JOHN R. THOMAS,  
Respondent.

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The State cannot be compelled to proceed with the erection of a public building or the prosecution of a public work at the instance of a contractor therefor.

A law of the State suspending or discontinuing a public work under contract, or providing for its performance by different agencies, is not subject to any constitutional objection because the change authorized involves a breach of the contract; the obligation of the contract is not impaired by the refusal of the State to perform it; the contractor, if not in default, has a just claim against the State for damages resulting from the breach and a remedy by appeal to the legislature.

Accordingly *held*, that the act of 1874 (chap. 323, Laws of 1874), suspending the commissioners appointed under the act of 1870 (chap. 427, Laws of 1870) to construct a State reformatory at Elmira, and providing for the appointment of a superintending builder with power to contract for a completion of a certain portion of the work upon a changed plan, etc., although in effect a refusal to proceed under the plans and contracts then existing for the work, and a violation of such a contract, was not unconstitutional, and that an action could not be maintained at the suit of a contractor to restrain the superintending builder, appointed under said act of 1874, from entering into a new contract under the authority of and in the manner prescribed by said act.

(Argued January 24, 1876; decided February 1, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, affirming a judgment in favor of defendant entered upon a decision of the court at Special Term.

This action was brought to have the act chapter 323, Laws of 1874, declared unconstitutional and void so far as it authorized defendant, as superintending builder of the State reformatory at Elmira, appointed under said act, to relet a contract for the brick and stone work of said building, and to restrain defendant from entering into any such new contract.

The court found, in substance, that under the act chapter 427, Laws of 1870, commissioners were duly appointed to erect the State reformatory at Elmira, who entered into a contract with one George W. Aldrich for the brick and stone

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Statement of case.

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work of the buildings, which contract was assigned by Aldrich, with the assent of the commissioners, to plaintiffs, who entered upon the performance, and have performed, and are ready and willing to complete performance. That under and in pursuance of the provisions of said act of 1874 the defendant was duly appointed one of the superintending builders provided for by said act, and was duly assigned to and assumed the sole charge of the said Elmira reformatory; that he changed the plans and specifications of said reformatory so as to render the sum of \$300,000 sufficient to complete the center building and south wing so as to receive convicts (which changes of plan and specifications were duly approved by the governor and comptroller), and had proceeded duly to advertise for proposals for furnishing the materials and labor necessary for the erection and completion of said center building and south wing, according to said new plans and specifications, when this action was commenced and the temporary injunction herein was served upon him. That the contract of the plaintiffs, based upon the plans and specifications of the said commissioners, was wholly inapplicable to the new plans and specifications of the defendant, approved as aforesaid, and that it would have been impossible to erect the said buildings, according to the said new plans and specifications, under the said contract of the plaintiffs.

*Wm. H. Bowman* for the appellants. Plaintiffs had no remedy against the State, and no action could be brought against it. An injunction was the proper remedy. (High on Injunctions, § 796.)

*Geo. F. Danforth* for the respondent. No case was made for equitable relief. (High on Injunctions, §§ 695, 697; *People v. Canal Board*, 55 N. Y., 394; *Thompson v. Comrs.*, etc., 2 Abb. Pr., 248.) Plaintiffs, if injured, have a claim against the State. (*Coster v. Mayor of Albany*, 43 N. Y., 408; *Ex parte Lange*, 18 Wall., 200.) Defendant, in doing the acts complained of, violated none of the plaintiffs' rights. (Laws of 1874, chap. 423, p. 400.)

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Opinion of the Court, per ANDREWS, J.

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ANDREWS, J. This action cannot be maintained.

1. The State cannot be compelled to proceed with the erection of a public building, or the prosecution of a public work at the instance of a contractor with whom the State has entered into a contract for the erection of a building or the performance of the work. The State stands, in this respect, in the same position as an individual, and may at any time abandon an enterprise which it has undertaken, and refuse to allow the contractor to proceed, or it may assume the control and do the work embraced in the contract, by its own immediate servants and agents, or enter into a new contract for its performance by other persons, without reference to the contract previously made, and although there has been no default on the part of the contractor. The State in the case supposed would violate the contract, but the obligation of the contract would not be impaired by the refusal of the State to perform it. The original party would have a just claim against the State for any damages sustained by him from the breach of the contract, and although the claim could not be enforced through an action at law, the remedy by appeal to the legislature is open to him, which can, and it must be presumed will, do whatever justice may require in the premises. This remedy is the only one provided in such a case, and this is known to the party contracting with the State, and the courts cannot say that is not certain, reasonable and adequate. (See *Coster v. Mayor, etc.*, 43 N. Y., 408.) If the court should undertake by its order or judgment to protect the contractor in the possession of the building or premises to enable him to proceed with the work under his contract, he would still be left without remedy to obtain payment except through an appropriation by the legislature. A law of the State suspending or discontinuing a public work or providing for its performance by different agencies from those theretofore employed is not, therefore, subject to any constitutional objection because the change would involve a breach of contract with a contractor with whom it had entered into a contract for doing it. That a person who has

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Opinion of the Court, per ANDREWS, J.

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employed another to perform labor may refuse to allow the other party to proceed, and that the latter cannot thereafter insist upon specifically performing the contract, was decided in *Clark v. Marsiglia* (1 Den., 317).

2. The legislature, by chapter 323, Laws of 1874, in effect refused to proceed with the construction of the Elmira reformatory under the existing plans and contracts for the work. The building of the reformatory was authorized by chapter 427 of the Laws of 1870. The act provided for the appointment by the governor of five building commissioners, who were charged with the general superintendence of the ground for the reformatory, which they were authorized to purchase, and the design and construction of the building, subject to the approval by the governor, comptroller and State engineer of the plan adopted by the commissioners. Under this act a site was purchased, and a plan of the building was adopted and approved, and the commissioners entered into a contract with one Aldrich to furnish the materials and do the stone and brick work required in its erection. The contractor, with the consent of the commissioners, assigned his contract to the plaintiffs, who proceeded with the work, and there had been expended in all, at the time the act of 1874 was passed, including the sum expended in the purchase of the site, the sum of \$458,000. The foundation walls had then been laid, and a portion of the front wall, and some other work had been done, and a much larger sum than had been expended would have been required to complete the building according to the plan. The act of 1874 suspended the commissioners appointed under the act of 1870, and provided for the appointment by the governor of a superintending builder in their place, and vested in him, so far as the construction of the building was concerned, all the powers and duties theretofore possessed by the commissioners. It appropriated \$300,000 to complete the center building and south wing, provided the plan of the building could be so changed that the appropriation should be sufficient for that purpose, and required that the new plan should

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Opinion of the Court, per ANDREWS, J.

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be approved by the governor and comptroller. It further provided that "the purchasing of the material and all things connected with the *execution* of said building shall be done by contract, and all contracts shall be awarded to the lowest responsible bidder, after being advertised as is now required by law for the letting and advertising of State work on the canals." This legislation was inconsistent with the plaintiffs' contract. It was the evident intention of the legislature to change the plan of the building so that the center building and wing might be completed at a cost not exceeding the amount of the appropriation, and also that the work should be done by contract after advertisement, and that the contract should be let to the lowest responsible bidder. The purpose of letting the work on the changed plan by advertisement is inconsistent with an intention that the plaintiffs should proceed under their contract. So also by the contract with Aldrich, the commissioners by whom it was executed were made the final arbiters in case of disagreement between the contractor and the superintendent or engineer employed by the commissioners in making up the final account of work done under the contract, and it contains other provisions inconsistent with the performance of the work under the plaintiffs' contract.

3. The defendant was appointed superintending builder under the act of 1874. It was within the scope of his authority to enter into a new contract for the completion of the center and south wing of the building with the lowest bidder, after due advertisement, and he could not be enjoined from proceeding to execute the authority conferred upon him as the agent of the State, and from advertising in letting the work, at the instance of the plaintiffs, who had no legal interest in the question, and whose rights were not impaired by his proposed action.

The judgment of the General Term should be affirmed.

All concur.

Judgment affirmed.

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Statement of case.

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ORRIS MARSH, Appellant, v. THE TOWN OF LITTLE VALLEY,  
Respondent.

It is the duty of a town to provide means for the payment of its bonds lawfully issued. In case of failure to perform this duty, the holder of the bonds may maintain an action against the town thereon; and this, although by the act under which they were issued, it is made the duty of the board of supervisors of the county to impose and levy a tax to pay the bonds.

*It seems*, that the holder of the bonds having thus a legal remedy, could not resort to a mandamus against the board of supervisors.

Such settled and admitted obligations of a town do not require to be audited and allowed by the board of town auditors.

Under the provisions of the act of 1869 (chap. 590, Laws of 1869), legalizing the proceedings of a special town meeting of the electors of defendant, at which a tax was voted for the payment of bounties to those furnishing substitutes under the call of the President of July, 1864, and making it the duty of the board of town auditors to audit and allow claims therefor, such board was authorized to audit the claims at a special meeting called for that purpose; they were not limited in their action to the annual meeting prescribed by statute for the auditing of town accounts.

Under said act the officers authorized thereby (§ 3) to issue town bonds for the sums audited were vested with a discretion as to the form of the obligations and the time of payment.

The repeal of said act by the act of 1873 (chap. 21, Laws of 1873), did not affect bonds already issued. The vested rights of the holders of the bonds cannot be defeated by subsequent legislation.

(Argued January 24, 1876; decided February 1, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, affirming a judgment in favor of plaintiff entered upon a decision of the court upon trial without a jury. (Reported below, 1 Hun, 554; 4 T. & C., 116.)

This action was brought upon three bonds issued by defendant under and in pursuance of chapter 590, Laws of 1869.

The act legalizes the proceedings of a town meeting held by defendant's electors, at which it was voted to raise money by tax to pay to each one furnishing substitutes under the call of the president of July, 1864, the sum of \$200. It



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Statement of case.

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authorized (§ 2) the board of town auditors, at any meeting, to audit and allow to each individual furnishing a substitute to the credit of the town \$200, with interest, and provided (§ 3) that the supervisor and town clerk, on certificate of a majority of the auditors, should issue a bond for the sum so audited to each person who had furnished a substitute. The three persons to whom the bonds in suit were issued furnished substitutes and presented their claims to the board of town auditors at a special meeting of the board held for the purpose of auditing claims. Under the act said claims were audited and allowed and the bonds in suit were issued. By the bonds, which were dated June 11, 1869, the town was obligated to pay the amounts on the 1st day of February, 1873, with annual interest, at the office of S. S. Marsh, Little Valley.

It was claimed by the defendant's counsel that as by said act (§ 5) it was made the duty of the board of supervisors of the county, at any annual meeting, to levy taxes upon the taxable property of the town for the payment of these bonds, no duty was imposed upon the town to provide money for their payment, but that plaintiff's remedy was by mandamus against said board; also that the officers issuing the bonds had no authority to fix the time and place of payment, or to provide for the payment of interest; also that the repeal of said act of 1869, by the act chapter 21, Laws of 1873, invalidated the bonds.

*Henderson & Wentworth* for the appellant. The court erred in deciding that this action could be maintained on the facts proven. (Laws 1869, chap. 590; *Lorillard v. Town of Monroe*, 11 N. Y., 392; *People v. Bd. of Auditors of Westford*, 38 How., 23; 53 Barb., 555; *Northrup v. Town of Pittsfield*, 2 N. Y. S. C., 108; *People v. Martin*, 58 Barb., 286; *Rich. Co. G. L. Co. v. Town of Middletown*, 1 N. Y. S. C., 433.) The board of town auditors had no authority or jurisdiction under the second section of chapter 590, Laws of 1869, to audit the claims at their meeting June 11, 1869.

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Opinion of the Court, per MILLER, J.

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(3 Gen. Stat., 302, 303; *People v. Suprs. Queens Co.*, 1 Hill, 195, 200; *People v. Auditors of Westford*, 53 Barb., 555; 38 How., 23.) The bonds are void because the auditors, supervisor and town clerk had no authority to bind the town to pay such obligations. (Laws 1869, chap. 590, §§ 3, 5.)

*Cary & Jewell* for the respondent. Plaintiff's remedy was by action against the town in its corporate capacity and not by mandamus. (Laws 1869, chap. 590, § 4; 2 R. S., 473, § 90; 1 id., 337, § 1; *People v. Croton Aque. Bd.*, 49 Barb., 264; *Brown v. Town of Canton*, 4 Lans., 409; *Ex parte Lynch*, 2 Hill, 46; *Hathaway v. Town of Solon*, 5 Lans., 267; *Northrup v. Town of Pittsfield*, 2 N. Y. S. C., 108; *Sun Mut. Ins. Co. v. Mayor, etc.*, 8 N. Y., 240.) The act of 1869 was constitutional and the tax valid. (*Guilford v. Suprs. Chenango Co.*, 13 N. Y., 143; *St. Joseph Township v. Rogers*, 16 Wall., 645; *Brewster v. City of Rochester*, 19 N. Y., 116.) Chapter 21, Laws of 1873, is a nullity so far as it affects plaintiff's right. (*People ex rel. Fountain v. Suprs. of Westchester*, 4 Barb., 64; *Benson v. Mayor, etc.*, 10 id., 223; *Bklyn. Cent. R. R. Co. v. Bklyn. City R. R. Co.*, 32 id., 358; *Conley v. Palmer*, 2 N. Y., 182; *Vanderkar v. Kens. R. R. Co.*, 13 Barb., 390.)

MILLER, J. The plaintiff's claim is founded upon three several bonds purporting to have been issued in pursuance of chapter 590 of the Laws of 1869. The act in question legalizes the acts and proceedings of the electors at a special town meeting which had previously been held for the purpose of raising money to pay bounties for furnishing substitutes; authorizes the board of town auditors to audit such claims, and the issue of town bonds to each person furnishing a substitute as therein provided. The fourth section of the act declares that said bonds shall be legal claims against the town; and the fifth section makes it the duty of the board of supervisors, at any annual meeting, to levy and impose a tax for the payment of said bonds. The bonds being issued

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Opinion of the Court, per MILLER, J.

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as the law requires, the town is obligated to provide means for the payment of the same. And the several amounts thereby secured are not in the nature of unliquidated demands, which are required to be audited and allowed by the board of town auditors, and which these officers are authorized by law to adjust and settle. As each of the bonds upon its face is an admitted debt against the town, which it is liable to pay, the question arises whether an action will lie to recover the amount, or some other remedy must be adopted for that purpose. It is insisted that no duty or obligation of providing the money and paying the bonds is imposed upon the defendant, and that the remedy is by mandamus against the board of supervisors. This position is, I think, erroneous, and cannot be upheld. The provision of the fifth section of the act, which requires the board of supervisors to levy taxes for the payment of said bonds, is a duty imposed upon public officers with a view of carrying out the general purposes of the law; and after the bonds are issued and in the hands of *bona fide* holders, they constitute a lawful demand against the town, for the payment of which its officers are bound to provide. Upon their failure to do so, an action lies against the town, which, as a body corporate, can sue and be sued in the manner prescribed by the laws of this State (1 R. S., 337, § 1; 2 id., 473, § 95); and if a judgment is obtained, it becomes a town charge (1 id., 357, § 8), which is to be laid before the board of supervisors, and the amount assessed, levied and collected the same as other contingent charges against the town. Numerous decisions in the Supreme Court sustain an action against a town in cases of a similar character. The subject is fully discussed in *Brown v. The Town of Canton* (4 Lans., 409); *Hathaway v. The Town of Solon* (5 id., 267); *Northrup v. The Town of Pittsfield* (2 T. & C., Sup. Ct., 108), and does not require elaboration.

In *Brown v. The Town of Canton* (*supra*), the action was upon an instrument executed to secure bounty money, similar in its character to that upon which this action is brought.

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Opinion of the Court, per MILLER, J.

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The right to prosecute a town by action in similar cases is also sanctioned by this court in *Hathaway, Supervisor, v. The Town of Cincinnati*, recently decided. The case last cited has all the essential features of *Hathaway v. The Town of Solon* (*supra*), and the point discussed was distinctly presented and decided. As the plaintiff had a clear legal remedy by action against the town, and the liability of the defendant was beyond any question, a mandamus would not lie. (*Ex parte Lynch*, 2 Hill, 45; *Perkins v. Hawkins*, 46 N. Y., 9; *People v. Croton Aqueduct Board*, 40 Barb., 264.) Most of the authorities relied upon to sustain the right to a mandamus in a case like this are reviewed and considered in some of the cases already cited, and a further examination is not required. There was no duty, therefore, incumbent upon the plaintiff, nor any legal obligation, to seek a remedy by a mandamus against the board of supervisors.

The objection made that the board of town auditors had no authority to audit the claims upon which the bonds were issued, at the time named, is not well taken. They are authorized to make the audit at any meeting of the board by the second section of the act. This does not mean the annual meeting only, but at such meeting as may be convened for that purpose. Considering the object of the act, it is fair to assume that an early meeting of the board was intended, and that no great delay was designed in adjusting the claims provided for. The time of the meeting, as well as the form of the obligations to be issued, and the time of payment, to which objections are now made, were evidently intended to be vested in the discretion of the officers who were authorized to issue the bonds, and it is not apparent that they have exceeded their jurisdiction in any of the particulars named. It may also be added that the objections last considered do not appear to have been presented upon the trial, and for that reason they are not now available.

It is too evident to require discussion that the repeal of the act of 1869, by chapter 21 of the Laws of 1873, could not affect the bonds already issued, and the holders have a vested

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Statement of case.

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right to collect the same, which the law fully protects. Good faith demands that those rights should be protected, and they cannot be impaired by any subsequent modification or repeal of the statute under which they were issued.

The judgment was right, and must be affirmed.

All concur.

Judgment affirmed.

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| 64  | 117 |
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JOHN H. ARNOLD et al., Exrs., etc., Appellants, v. CHARLES H. NICHOLS, impleaded, etc., Respondent.

Where one engaged in business enters into a copartnership with another for the purpose of continuing the business, and transfers its assets to the firm in consideration of an agreement of the firm to assume and pay certain specified debts incurred in the business, and to apply the assets first to the payment of said debts, the agreement is to be deemed as made for the benefit of the creditors holding the claims specified, and an action may be maintained by such a creditor against the firm upon such agreement.

*Merrill v. Green* (55 N. Y., 270) distinguished.

An allegation in such an action, in the answer of the partner, that he was induced to enter into the agreement by the fraud of the original debtor in the absence of allegations that he has rescinded the agreement on account of the fraud, or has sustained damages by reason thereof, does not authorize evidence of the fraud upon the trial.

(Argued January 24, 1876; decided February 1, 1876.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department reversing a judgment in favor of plaintiff, entered upon a verdict, and granting a new trial.

This action was brought against the defendants as members of the firm of J. W. Bowen & Co. to recover an indebtedness of said Bowen to plaintiff's testator, which, as alleged in the complaint, the said firm had assumed and agreed to pay in consideration of the transfer to the firm by said Bowen of the property and assets of his business.

The facts are set forth sufficiently in the opinion.

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Opinion of the Court, per EARL, J.

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*Benj. K. Phelps* for the appellants. Plaintiffs had a right of action. (20 N. Y., 268; 37 id., 575; 24 id., 178, 180.) The offer of defendant to prove that he was induced through fraud to enter into the partnership was properly ruled out. (*Minturn v. Main*, 7 N. Y., 227; *McKnight v. Dunlap*, 5 id., 537; *Bowman v. Teal*, 23 Wend., 309.)

*Wm. Howard Wait* for the respondent. The court erred in excluding evidence of fraud on the part of Bowen in inducing defendant to enter into the partnership. (Broom's Leg. Max., 226, 702; *Van Duzer v. Howe*, 21 N. Y., 531; *McWilliams v. Mason*, 31 id., 294; *Coleman v. Bean*, 1 Abb. [Ct. App. Dec.], 394; 3 Keyes, 94; *Merrill v. Green*, 55 N. Y., 270; *Durand v. Curtis*, 57 id., 7.)

EARL, J. For some years prior to the 15th day of August, 1867, the defendant Bowen had been engaged in the city of New York in the business of importing and dealing in fancy goods, and on that day the plaintiff's testator, Hinman, loaned to him to be used in his business the sum of \$2,000. Bowen continued in business alone until January, 1868, when he formed a copartnership with the defendant Nichols, and Bowen and Nichols, under the firm name of J. M. Bowen & Co., continued to carry on the business until May, 1869, when they dissolved. At the time of the formation of the copartnership, the evidence tends to show, and we must assume that the jury found, that Bowen transferred his business assets to the firm of J. M. Bowen & Co., and that in consideration thereof, the firm assumed and agreed to pay certain specified debts of Bowen, among which was Hinman's debt for the money loaned as above stated. It was expected at the time that the assets would exceed the debts assumed by the firm by at least \$30,000; and this excess of \$30,000 was to be credited to Bowen on the books of the firm as his share of capital to be contributed. The assets were not as large as expected, but were shown to be more than sufficient to pay all the debts assumed. They were first to be used to pay the

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Opinion of the Court, per EARL, J.

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debts, and the balance whatever it might be, was to be credited to Bowen.

Bowen transferred to the firm the assets to which his creditors had the right to look for the payment of their claims, and hence the promise of the firm to pay such claims must be deemed to have been made for their benefit. It was not made to exonerate Bowen from the payment of his debts, and not primarily nor directly for his benefit, as his property was to be taken to pay the debts, and he was still to remain liable as one of the principals to pay them. This case is, therefore, unlike the case of *Merrill v. Green* (55 N. Y., 270), and the action is maintainable upon the principles laid down in the case of *Lawrence v. Fox* (20 N. Y., 268), and also recognized in *Burr v. Beers* (24 N. Y., 178), *Thorp v. Keokuk Coal Company* (48 N. Y., 253), and *Claflin v. Ostrom*, (54 N. Y., 581). Hinman had the right to adopt the promise made expressly for his benefit.

The defendant Nichols alleged in his answer that he was induced to enter into the alleged agreement by the fraud of Bowen, but he did not allege that he had rescinded the agreement on that account, or that he had ever suffered any damage on account thereof. Upon the trial he offered to prove that he was induced to enter into the agreement by fraud, and the court excluded the evidence. This ruling was right. When Nichols discovered that he had been defrauded into making the agreement, he could have repudiated the agreement on that ground, given up his interest in the assets transferred to the firm and placed them again in the hands of Bowen. A creditor could not adopt the agreement which Bowen had made for his benefit, without taking it subject to any infirmity which attached to it, and subject to any assault which Nichols could make upon its validity. But Nichols could not retain the fruits of the agreement and refuse on account of fraud to bear its burdens. Again, fraud could, in no aspect of the case, furnish a total or partial defence to the action, as the firm had more than sufficient assets transferred to it by Bowen, to pay all the debts assumed. Hence there

## Statement of case.

was no fraud affecting Hinman's claim or his right of recovery.

The charge of the judge at the trial was free from any just criticism. It was, that if the jury found that there was an agreement between Bowen and Nichols in entering into copartnership, that J. M. Bowen & Co., the new firm, should take the business assets of Bowen, and in consideration thereof pay the specified liabilities of Bowen, the plaintiffs were entitled to recover, and that if they found there was not such an agreement, they were not entitled to recover. This charge fairly covered the law of the case.

We have considered the other exceptions to which our attention was called upon the argument, and they are so clearly without foundation as to require no particular notice.

The order of the General Term must be reversed, and the judgment entered upon the verdict affirmed, with costs.

All concur.

Order reversed and judgment accordingly.

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| 64  | 120  |
| 168 | 1104 |

WILLIAM H. GLENNEY, Respondent, v. JEREMIAH H. STEDWELL et al., Appellants.

Under section 891 of the Code, a plaintiff in an action pending may examine the adverse party on oath before service of the complaint, and for the purpose of obtaining facts on which to frame the complaint.

If the affidavit presented to a judge for the purpose of procuring an order for such examination, discloses a case giving the judge power to act, his action is discretionary and cannot be reviewed here.

The effect of said provision cannot be altered by a rule of the court.

(Submitted January 18, 1876; decided February 1, 1876.)

APPEAL from order of the General Term of the Superior Court of the city of New York affirming an order of Special Term denying a motion to vacate an order granted by a justice of said court requiring certain of the defendants to appear and be examined as parties before trial.



## Statement of case.

Plaintiff's affidavits, upon which the order for examination was granted, after stating the commencement of the action and generally the nature thereof, the relief sought, stated that plaintiff was not able to frame his complaint and does not know the names of the necessary defendants; and that it is necessary for him, in order to obtain knowledge of said names and of the facts necessary to frame his complaint, that he should have an order to examine said defendants, so that he could obtain from them the necessary information; also, that he had stated the case to his counsel, and was advised by him that he had a meritorious cause of action, and that the discovery he seeks is absolutely necessary to enable him to frame his complaint.

*F. N. Bangs* for the appellants. It was not within the jurisdiction, power or authority of the court to order an examination of a party under section 391 of the Code, before issue joined. (Laws 1847, p. 630; *Ainsworth v. Bolmer*, 1 Sandf., 688; id., 713; 1 Code R., 4; *Anderson v. Johnson*, id., 95; *Balbani v. Grasheim*, 2 id., 75; *Miller v. Mather*, id., 101; *Porter v. Elliott*, 2 Sand., 667; *Chichester v. Livingston*, 3 id., 118; *Suydam v. Suydam*, 11 How., 518; *Leeds v. Brown*, 5 Abb., 418; *Green v. Wood*, 6 id., 277; *Watson v. Gage*, 12 id., 215; *Plato v. Kelly*, 16 id., 180; *Woods v. De Figamere*, 7 Robt., 607; *Cook v. Bidwell*, 17 Abb., 300; *Mc Vicker v. Greenleaf*, 4 Robt., 657; *Fullerton v. Gaylord*, 7 id., 559; *Green v. Herder*, id., 455; *Bell v. Richmond*, 50 Barb., 571; *Duff v. Lynch*, 36 How., 509; *Havemeyer v. Ingersoll*, 12 Abb. [N. S.], 244, 301; *Winston v. English*, 14 id., 119; *Morgan v. Whittaker*, 14 Abb., 127.)

*Robert Sewell* for the respondent. The effect of section 391 of the Code cannot be altered by a rule of the court. (*Winston v. English*, 44 How., 405; *Mc Vicker v. Greenleaf*, 4 Robt., 657; 1 Abb. [N. S.], 452; *Duffy v. Lynch*, 36 How., 509; *Fullerton v. Gaylord*, 7 Robt., 551; *Barto v. Himrod*, 8 N. Y., 491; Broom's Leg. Maxims, 807; *Coleman*

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Opinion of the Court, per FOLGER, J.

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v. *Nantz*, 63 Penn. St., 178.) The matter was discretionary with the court below and the appeal should be dismissed. (*Livermore v. Bainbridge*, 56 N. Y., 72.)

FOLGER, J. This case calls for a declaration, of the meaning of chapter 6 of part 2 of the Code of Procedure, entitled "Examination of Parties." There has been conflict of opinion thereon in the courts, which have been called upon to put it into practical operation; as is shown by the diverse decisions rendered, and by the several rules of practice that have been framed and promulgated.

Looking at the practice for which this chapter is a substitute, and giving to the different sections of it the construction that they seem to demand, we have come to the conclusion, that a plaintiff in an action pending, may examine the adverse party on oath, before the service on him of a complaint, and for the purpose of obtaining the facts on which to frame a complaint.

As a general rule, a court of equity has jurisdiction to entertain a bill, for the discovery of facts which may aid in the prosecution or defence of an action in another court, and which may enable the plaintiff to ascertain who will be proper parties to that action. (*Moodaly v. Morton*, 1 Bro. Ch., 469; S. C., 2 Dickens, 652.) The bill may be filed when the plaintiff has become actually involved in the litigation, or when he is only liable to be so; and whether he has, or has not yet, commenced his action. (Adams' Equity, pp. [\*19] 86, 87; 2 Story Eq. Jur., §§ 1483, 1495; *City of London v. Levy*, 8 Ves. Jr., 404.) This jurisdiction was conferred upon the Supreme Court by the Constitution of 1846 (art. 6, § 3).

The commissioners who reported the Code of Procedure, and the legislature which enacted it, found the Supreme Court in possession of this jurisdiction. It is not to be supposed that so great a change was intended to be made, as to abolish this power and to take away this right and means of relief to suitors, unless there is found clear indication of it in the report of the commissioners, or an unmistakable inten-

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Opinion of the Court, per FOLGER, J.

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tion in the terms of the enactment. It is suggested that it is a power liable to abuse, in the use it may be put to in harassing of antagonists by inquisitorial inquiry. It is not a sound argument, which reasons against the existence of a power, from the possibility of the abuse of it. And it is not to be denied, that the prudent and legitimate use of it will not of necessity be found vexatious, and that it has heretofore proved of benefit to honest suitors and a great aid to justice. If the power which the Court of Chancery had under the former practice, was exercised without vexation to defendants, why may not the same power, be benignly exerted by the courts at this day? It is for the judges now, by rules of practice and by rulings at the examination, to keep the plaintiff within proper bounds, and to ward off from the defendant all inquiry which is vain or curious.

We find that in reporting the provisions of the Code for the examination of parties to actions, which prohibit the bringing of a bill of discovery in one action in aid of another action, the commissioners meant them to be a means of accomplishing, substantially, the same ends which were attained in a court of equity in the exercise of its jurisdiction to compel a discovery. (Comrs. 1st Report, p. 244.) Nor do the sections reported and adopted prohibit the essential relief before attained. They interdict the mode of relief, as well might be, after the distinctions were removed between a court of law and one of equity, and the commingling in one of the powers and jurisdictions of the two kinds of courts. They might well then provide that, in the same action, with whatever subject-matter it dealt, discovery should be afforded and relief granted. It was a rule in equity that a bill for discovery would not be entertained, when the bill asked also for relief, which a court of law alone could give. But when equity jurisdiction no longer stood alone, but was committed with that at law, to the same court, this rule had lost the reason for it, and the mode of procedure could be adapted to the change. Section 389 of the Code, (the first section of the chapter), does not prohibit the obtaining discovery, but

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declares that it can be sought only in the mode specified in that chapter. In the same action in which the relief is sought must the discovery be sought also. And this seems to be the only substantial restriction put upon the breadth of the former practice. The action for relief must be commenced and the discovery must be sought in that action, and from a party thereto, in the manner provided in succeeding sections of the chapter. Section 390 makes it lawful to examine as a witness a party to an action, whether that action be equitable in its nature or be one at law. So did the Laws of 1847. (Laws of 1847, vol. 2, chap. 426, p. 630.) It needed an affirmative enactment to make it so. The whole scope and purpose of that section is to make lawful such an examination. And it declares first the legality of it; then the means of bringing the party to the book; then the rules under which the examination shall be had; and then, with a limitation of the generality with which it commences, states the three modes in which the examination shall be had: First, at the trial; second, conditionally; third, by commission. The act of 1847, before mentioned, had provided for these three ways and also for a fourth, to wit, for the perpetuation of his testimony, in accordance with the Revised Statutes. (2 R. S., p. 398, § 33.) All that section 390 effects is, that a party to an action may be called and examined as a witness, in some of the same circumstances as a person not a party to the suit or proceeding. It is at once perceived that if a suitor is debarred by section 389 from seeking discovery, save in the action in which he seeks relief, and if the discovery he may have in his action for relief is only at the times and in the mode prescribed by section 390, the rights and benefit he would have had by the former bill of discovery in a court of equity, were materially abridged; for he could not search the mind and memory of his adversary by commission (2 R. S., p. 393, § 12), or at the trial, only after an issue of fact had been joined in the action; and conditionally (*id.*, p. 391, § 1), only when he was about to depart the State, or was sick or infirm. The statute for the perpetuation of testimony (*id.*,

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p. 495, § 43) enables a person who is a party to a suit pending, or who expects to be a party in a suit about to be commenced, to take testimony conditionally and to perpetuate it, and there is no restriction as to the time during the pendency of the action when this may be done, save perhaps by implication, that it shall be before a trial. But all these provisions look not to the same end, as sometimes did a bill of discovery. The statutes look to the obtaining and preserving depositions as testimony, to be used as testimony, and that upon the trial, by either party who chooses so to do.

The bill for discovery, as we have seen, had much wider range than that, and enabled a suitor to procure the precise information, if it lay in the mind of his adversary, on which he might frame his pleadings in his action for relief; might select the persons whom he should make defendants, and procure the knowledge of facts which would qualify him to come to trial well prepared. If it be said that the statute for the perpetuation of testimony, without expressing this as one of its purposes does, in fact, in connection with the law of 1847, enable the party to attain just this, the answer is that section 389 has, by implication, so far repealed the law of 1847; for that section declares that the examination of a party shall be had only in the mode provided by that chapter in its following sections. We repeat, then, that unless there is some other mode of examining a party than conditionally, by commission, or at the trial, the suitor has not the benefit which the former bill of discovery would have given him. And we add, that he has not the benefit which the law of 1847 would have given him. We are quite prepared, then, to find in succeeding sections some broader privilege. We do find that the next section to the three hundred and ninetieth does, in its terms, give it. As originally reported and adopted (being then section 345 of 1848), it provided that the examination instead of being had as provided in section 390 (384 of 1848), might be had at any time before trial, at the option of the party claiming it. "The examination" here spoken of is, of course, or might be construed to be,

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the examination spoken of by the two preceding sections, the examination of a party to the action conditionally, by commission, or at the trial. It thus made a substitute for the mode of conditional examination, and the mode of examination by commission (if it were possible), and at the trial, which was unnecessary, as the law had already provided a machinery for those. So the next year (1849) there was an amendment (of section 391), and the power to examine at any time before the trial, was given in place of the examination at the trial only. The Code now stands, that a party to an action may be examined conditionally, or by commission, or at the trial, or in place of at the trial at any time before the trial, at the option of the other party. So that the Code now, as to a party, is nearly equal in extent to the Revised Statutes as to witnesses, and nearly parallel with them, and very nearly comes up to the former bill of discovery. A party as well as a person not interested in the action may be examined conditionally as soon as the action is pending; by commission as soon as there is an issue of fact, and at the trial. And if he may be examined at once, on the service of process, though the complaint be not served, his testimony may be perpetuated. And it is an argument that section 391 intends that he should be, for else there is no method of perpetuating his testimony before the service of complaint, as may be done with that of any other witness.

It is doubtful whether the testimony of one who is likely to be a party to an action not yet commenced, may be perpetuated under the Revised Statutes above cited, for they deal only with witnesses, and not with a party to the action, either real or prospective. We express no decided opinion as to this. We do hold that but for the three hundred and ninety-first section, construed as we construe it, a party to an action, cannot be examined after process served, and before complaint served. The omission to provide, by the Code, for the perpetuation of the testimony of a prospective party, before suit commenced, for the benefit of one who expects to be a party to a suit about to be commenced, if it exists, is a

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failure to fully carry out the avowed purpose of the codifiers, to make the parties to actions the prime and principal source of the testimony upon which they are to be determined. (See Report, as above cited.) And the omission to provide for the examination of a party, before complaint served, would be another failure to attain fully that purpose; and also, a failure in the avowed purpose to provide an ample substitute for the former bill of discovery.

Apart from the argument to be had from this avowed purpose, the language of the three hundred and ninety-first section, "at any time before trial," is broad enough to authorize an examination, at once, after the service of process. There is reason to conclude that so the legislature meant it; for thus is harmonized the purpose of giving to a court of law the power to do that which a court of equity could have done by a separate action in aid of one at law, with the other purpose of abolishing the wearisome machinery of the Court of Chancery, and of simplifying and shortening the methods of procedure. The substance is retained, and the process is more ready.

Section 395 as originally passed and as it remained until 1863, did not harmonize with the sections preceding it. It allowed a party, called by his adversary, to be examined in his own behalf in respect to any new matter pertinent to the issue. If we take this to mean the issue framed by the pleadings, it would not give him a right to testify in his own behalf when no issue had been made. This was not in accord with section 390, upon any construction of it, nor with section 391 as we construe it; for, if examined conditionally by the adverse party, it might be before issue joined by the pleadings. And if he was examined before a judge, under section 391, before trial, it might be before issue joined. There would have been strong reason to infer that the phrase, "pertinent to the issue," was not to be interpreted technically, but to mean the real matter in dispute between the parties. However, any discussion of this is no longer of practical use, for, in 1863, an amendment of section 395



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remedied any seeming or real inconsistency, and permits a party called and examined by his adversary, to testify generally, in his own behalf, subject to the same rules of examination as other witnesses.

Some considerations are sought to be based upon the language of the rule of practice, number 21, adopted by the convention of the judges, in 1874; and the fact that there is a change in the phraseology from that of 1870. It is enough to say that the rule cannot alter the statute (*Rice v. Ehele*, 54 N. Y., 518), and the latter must be interpreted and followed.

The appellant urges that the plaintiff cannot need the information that he pretends to want, inasmuch as his affidavit discloses that he is so far conversant with the case as to be able to state it to counsel and to obtain advice of, and swear to, a good cause of action. The same answer might have been made to a bill of discovery under the former practice. It would not have prevailed. If the affidavit discloses such a case as gives the judge the power to act, what action he will take is discretionary with him, and may not be reviewed here.

The plaintiff claims, in his affidavit, that he needs to know the names of persons whom he has not yet sued, so that he may make them parties to the action. The appellant ingeniously urges that as they are not now named in the summons, it must be to another action than this that they will be made parties, which would be to violate the prohibition of section 389. Were the names of persons all that the plaintiff needs and seeks the objection would be stronger. He is not limited to that by the averments of his affidavit. Besides, it is not certain that there need be another action, even if there be others made parties. The court below may, in its discretion, grant an amendment of the present summons.

The order appealed from should be affirmed.

All concur.

Order affirmed.



## Statement of case.

GEORGE M. ROUNDS, by Guardian, etc., Respondent, v. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Appellant.

To make a master liable for the wrongful act of a servant to the injury of a third person it is not necessary to show that he expressly authorized the particular act, it is sufficient to show that the servant was engaged at the time in doing his master's business and was acting within the general scope of his authority; and this, although he departed from the private instructions of the master, abused his authority, was reckless in the performance of his duty and inflicted unnecessary injury.

While the master is not responsible for the willful wrong of the servant, not done with a view to the master's service or for the purpose of executing his orders, if the servant is authorized to use force against another when necessary in executing his master's orders, and if while executing such orders through misjudgment or violence of temper the servant use more force than is necessary, the master is liable.

Where a master claims exemption from liability for the tortious act of his servant while apparently engaged in executing his orders upon the ground that the servant was in fact pursuing his own purpose without regard to his master's business, and was acting willfully and maliciously, it is ordinarily a question to be determined by the jury.

Plaintiff jumped upon the platform of a baggage car on defendant's road to ride to a place where the cars were being backed to make up a train. Defendant's rules forbade all persons, except certain employes, riding on baggage cars and directed baggagemen to rigidly enforce the rule. As plaintiff's evidence tended to show, defendant's baggageman ordered plaintiff off while the car was in motion. A pile of wood was near the track. Plaintiff replied that he could not get off because of the wood, whereupon the baggagemaster kicked him off, he fell against the wood and then under the cars and was injured. In an action to recover damages, *held*, that the fact that plaintiff was a trespasser was not a defence, and that the evidence was sufficient to authorize the submission of defendant's liability to a jury.

The court charged that if the brakeman acted "willfully and maliciously toward the plaintiff outside of and in excess of his duty" defendant was not liable. He refused to qualify this charge or to charge that it was sufficient to exempt defendant from liability that the act of the brakeman was willful. *Held*, no error.

(Argued January 24, 1876; decided February 1, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, in favor of plaintiff,  
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| 75 | AD <sup>1</sup> 829 |
| 64 | 129                 |
| 78 | AD <sup>3</sup> 311 |

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entered upon an order denying a motion for a new trial and directing judgment on a verdict. (Reported below, 3 Hun, 329 ; 5 T. & C., 475.)

This action was brought to recover damages for injuries sustained by plaintiff in consequence of being kicked off of one of defendant's baggage cars by the baggageman.

The transaction resulting in the injury occurred at Norwich, May 3, 1872. The defendant operated a broad-gauge railroad from Binghamton to Norwich and a narrow-gauge road from Norwich to Utica. The passenger train from Binghamton on this occasion as usual ran to the depot at Norwich and transferred the passengers and freight to the Utica train and then backed south on a switch, a distance of about sixty rods, to the round-house to make up the new train which was to run back to Binghamton. The train consisted of the engine, an express car, a baggage and smoking car, one car divided into two compartments and one passenger car. The conductor of the train got off with the passengers at the depot and left it in charge of the baggageman to run back on the switch and make up the new train. While the train was unloading and transferring the passengers at the depot the plaintiff, a boy twelve years old, living near the depot, got on the platform of the baggage and smoking car, at the rear end, to ride down to the round-house. A quantity of wood was piled at one point along near the west side of the track for a distance of over 100 feet. While the train was backing down the track, and when it arrived at the wood pile, the baggageman in charge of the train discovered the plaintiff on the platform and ordered him off. According to the plaintiff's testimony, he replied : "I can't, the wood is right here ; I want you to help me," and thereupon the baggageman kicked him off. He fell against the wood and rolled under the car, the wheel of which passed over and crushed his leg. A printed notice was posted up in the baggage car and another one near where the plaintiff was standing on the platform, as follows : "No person will be allowed to ride on this baggage car except the regular

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train men employed thereon. Conductor and baggageman must see this order strictly enforced." Another printed notice was contained in the posted time cards as follows: "Train baggagemen must not permit any person to ride in the baggage car, except the conductor and news agent connected with the train. Conductor and baggageman will be held alike accountable for a rigid enforcement of this rule."

At the close of the plaintiff's evidence the defendant's counsel moved for a nonsuit on the grounds: 1. The plaintiff was a trespasser, or wrongfully on the cars of the defendant, and is not entitled to recover. 2. The plaintiff, by his own negligence, contributed to the accident. 3. Upon the evidence the defendant was not guilty of any negligence or wrongful act in reference to the plaintiff; that the acts of Gow (baggageman), which caused the injury, were not authorized by the defendant but were a willful and wanton assault by Gow upon the plaintiff, and for these acts and their consequences the defendant is not responsible to the plaintiff. The court denied the motion and ruled that it was a question for the jury whether the baggageman was there acting within the authority of the company in putting the boy off, and whether he acted willfully and wrongfully; to which the defendant excepted. After the defendant had given evidence contradicting the plaintiff's testimony, and at the close of the case, the defendant's counsel renewed his motion for a nonsuit on the same grounds, and also on the ground that no right of action is made against the defendant and that the evidence does not warrant a submission of any question of fact to the jury which could authorize a recovery. The motion was denied and the defendant excepted. The court then submitted the following questions to the jury, to which the defendant also excepted: 1. Did Gow put the boy off the cars? 2. Was he acting within the authority given him by the defendant? 3. Was he acting maliciously and in excess of his authority?

The court then charged the jury, among other things, that the plaintiff was a trespasser on the car, but if the baggage-

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man, nevertheless, in the discharge of his duty, pushed him off the train in an improper manner and at a dangerous place the defendant was liable; to which the defendant excepted. The court also charged the jury that if the baggageman pushed the boy off the train, and in doing so was acting as the employe of the defendant in good faith in the discharge of a duty he owed the company, the defendant would be liable for the careless and negligent discharge of his duty; but if he was acting willfully and maliciously toward the plaintiff, outside of and in excess of his duty, then the baggageman alone would be responsible in law for the consequences; to which the defendant excepted and requested the court to modify the charge or to charge that defendant was not liable if the baggageman acted willfully and wantonly without authority from defendant. This the court refused.

*Francis Kernan* for the appellant. Plaintiff was wrongfully on defendant's car and it was not liable for any injury sustained through the carelessness or neglect of its servants. (*Robertson v. N. Y. and E. R. R. Co.*, 22 Barb., 91; *Terry v. N. Y. and E. R. R. Co.*, id., 574; *Eaton v. D., L. and W. R. R. Co.*, 13 Am. L. Reg. [N. S.], 665.) The act of the baggageman was an unauthorized, wanton and willful trespass upon plaintiff for which defendant was not liable. (*Wright v. Wilcox*, 19 Wend., 343; *Isaacs v. Third Ave. R. R. Co.*, 47 N. Y., 122, 125-129; *Hughes v. N. Y. and N. H. R. R. Co.*, 4 J. & S., 222, 225-227; *Mali v. Lord*, 39 N. Y., 381; 47 id., 127; *Vanderbilt v. R. T. Co.*, 2 Comst., 479-482.)

*E. H. Prindle* for the respondent. The baggageman in putting plaintiff off the car acted carelessly and negligently for which defendant was liable. (*Higgins v. W. Tpke. and R. R. Co.*, 46 N. Y., 23; *Jackson v. Second Ave. R. R. Co.*, 47 id., 274; *Isaacs v. Third Ave. R. R. Co.*, id., 122; *Sanford v. Eighth Ave. R. R. Co.*, 23 id., 343.) Defendant was liable for the acts of its servants performed within the scope

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of their authority and in their master's business, even when malicious. (46 N. Y., 27; *Hamilton v. Third Ave. R. R. Co.*, 53 id., 27; *Goddard v. G. T. R. Co.*, 57 Me., 202; *Hanson v. E. and N. Am. R. Co.*, 62 id., 14; Am. L. Reg., No. 3, p. 197.) Plaintiff was guilty of no negligence at the time he was put off. (*Lovett v. S. and S. D. R. R. Co.*, 91 Mass., 557; *Holmes v. Wakefield*, 12 Al., 580; *Kline v. Cent. Pac. R. R. Co.*, 37 Cal., 400; *R. R. Co. v. Stout*, 17 Wall., 657; 23 N. Y., 343.) The charge of the judge was as favorable to the defendant as the law would allow. (*Jackson v. Second Ave. R. R. Co.*, 47 N. Y., 275.)

ANDREWS, J. There is, at this time, but little conflict of judicial opinion in respect to the general rule by which the liability of a master for the misconduct of his servant, resulting in injury to third persons, is to be tested and ascertained. In *Higgins v. The Waterliet Turnpike Company* (46 N. Y., 23) this subject was considered by this court, and the rule was declared to be, that the master was responsible *civiliter* for the wrongful act of the servant causing injury to a third person, whether the act was one of negligence or positive misfeasance, provided the servant was at the time acting for the master, and within the scope of the business intrusted to him. The master is liable only for the authorized acts of the servant, and the root of his liability for the servant's acts is his consent, express or implied, thereto. When the master is to be considered as having authorized the wrongful act of the servant, so as to make him liable for his misconduct, is the point of difficulty. Where authority is conferred to act for another, without special limitation, it carries with it, by implication, authority to do all things necessary to its execution; and when it involves the exercise of the discretion of the servant, or the use of force towards or against another, the use of such discretion or force is a part of the thing authorized, and when exercised becomes, as to third persons, the discretion and act of the master, and this, although the servant departed from the private instruc-

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tions of the master, provided he was engaged at the time in doing his master's business, and was acting within the general scope of his employment. It is not the test of the master's liability for the wrongful act of the servant, from which injury to a third person has resulted, that he expressly authorized the particular act and conduct which occasioned it. In most cases where the master has been held liable for the negligent or tortious act of the servant, the servant acted not only without express authority to do the wrong, but in violation of his duty to the master.

It is, in general, sufficient to make the master responsible that he gave to the servant an authority, or made it his duty to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. The master in that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders. The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority and inflicts an unjustifiable injury upon another. But it is said that the master is not responsible for the willful act of the servant. This is the language of some of the cases, and it becomes necessary to ascertain its meaning when used in defining the master's responsibility.

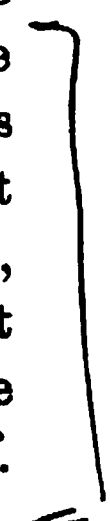
The case of *McManus v. Crickett* (1 East, 106) turned upon the form of the action and the distinction between trespass and case, but Lord KENYON, in pronouncing the judgment of the court, said: "Where a servant quits sight of the object for which he was employed, and, without having in

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view his master's orders, pursues that which his own malice suggests, his master will not be liable for such acts." This language was cited with approval in *Wright v. Wilcox* (19 Wend., 343), and the master was held not to be responsible where the servant, in driving his master's wagon along the highway, willfully whipped up his horses while the plaintiff's son, a young lad, was standing between the front and back wheels, attempting, with the implied permission of the servant, to get into the wagon, in consequence of which the boy was thrown down, run over and injured. The servant was cautioned by a bystander that if he did not stop he would kill the boy. The court, in the opinion delivered, assumed that the evidence showed that the servant whipped up the horses with a willful design to throw the boy off. The act of the servant was imminently dangerous, and it might reasonably be inferred from the evidence that he designed the injury which resulted from it. "The law," said COWEN, J., "holds such a willful act a departure from the master's business." So in *Vanderbilt v. The Richmond Turnpike Company* (2 Comst., 479), the master of the defendant's boat intentionally ran into the boat of the plaintiff, and the court held that this was a willful trespass of the master for which the defendant was not liable. In *Lyons v. Martin* (8 Ad. & El., 512) it was held that where a servant merely authorized to distrain cattle damage-feasant, drives cattle from the highway into his master's close, and there distrains them, the master is not liable. In *Mali v. Lord* (39 N. Y., 381) the act complained of was an illegal imprisonment of the plaintiff by the servant of the defendant, and the court held that the authority to do the act could not be implied from the general employment of the servant. The imprisonment, assuming that the suspicion upon which it was made was well founded, was illegal. The master could not lawfully have detained the defendant if he had been present, and the court were of the opinion that the servant could not be said to be engaged in his master's business when he assumed to do what the master could not have done himself.





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(See, also, *Bolingbroke v. The Local Board, etc.*, L. R., 9 C. P., 575.) It is quite useless to attempt to reconcile all the cases. The discrepancy between them arises not so much from a difference of opinion as to the rule of law on the subject as from its application to the facts of a given case.

It seems to be clear enough from the cases in this State that the act of the servant causing actionable injury to a third person does not subject the master to civil responsibility in all cases where it appears that the servant was at the time in the use of his master's property, or because the act, in some general sense, was done while he was doing his master's business, irrespective of the real nature and motive of the transaction. On the other hand, the master is not exempt from responsibility in all cases on showing that the servant, without express authority, designed to do the act or the injury complained of. If he is authorized to use force against another when necessary in executing his master's orders, the master commits it to him to decide what degree of force he shall use; and if, through misjudgment or violence of temper, he goes beyond the necessity of the occasion, and gives a right of action to another, he cannot, as to third persons, be said to have been acting without the line of his duty, or to have departed from his master's business. If, however, the servant, under guise and cover of executing his master's orders, and exercising the authority conferred upon him, willfully and designedly, for the purpose of accomplishing his own independent, malicious or wicked purposes, does an injury to another, then the master is not liable. The relation of master and servant, as to that transaction, does not exist between them. It is a willful and wanton wrong and trespass, for which the master cannot be held responsible. And when it is said that the master is not responsible for the willful wrong of the servant, the language is to be understood as referring to an act of positive and designed injury, not done with a view to the master's service, or for the purpose of executing his orders. In this view, the judge at the trial correctly refused to qualify his charge, or to charge that it was



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sufficient to exempt the defendant from liability that the act of the brakeman in putting the plaintiff off the car was willful. He had already charged that if the brakeman acted "willfully and maliciously towards the plaintiff, outside of and in excess of his duty," in putting him off of the car, the defendant was not liable. If the counsel intended to claim that the defendant was exempt from responsibility if the brakeman acted willfully, although without malice, the point was not well taken. That the brakeman designed to put the plaintiff off the car was not disputed, and this was consistent with the authority and duty intrusted to him. But a willful act which will exempt a master from liability for the tort of his servant, must be done outside of his duty and his master's business. The charge was, therefore, strictly correct, and the exception was not well taken.

Neither was the defendant entitled to have the court rule, as matter of law, that, upon the circumstances as shown by the evidence on the part of the plaintiff, the defendant was not responsible. It is conceded that the removal of the plaintiff from the car was within the scope of the authority conferred upon the baggageman. The plaintiff had no right to be there. He was not a passenger or servant, and had no express or implied permission to be upon the car. The brakeman, in kicking the boy from the platform, acted violently and unreasonably, and to do this while the car was in motion, and when the space between it and the wood-pile was so small, was dangerous in the extreme. But the court could not say from the evidence that the brakeman was acting outside of and without regard to his employment, or designed to do the injury which resulted, or that the act was willful within the rule we have stated. If the master, when sued for an injury resulting from the tortious act of his servant while apparently engaged in executing his orders, claims exemption upon the ground that the servant was, in fact, pursuing his own purposes, without reference to his master's business, and was acting maliciously and willfully, it must, ordinarily, be left to the

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jury to determine this issue upon a consideration of all the facts and circumstances proved. (See *Jackson v. The Second Ave. R. R. Co.*, 47 N. Y., 274.) There may be cases where this rule does not apply, and where the court would be justified in taking the case from the jury; but where different inferences may be drawn from the facts proved, and when, in one view, they may be consistent with the liability of the master, the case must be left to the jury. The fact that the plaintiff was a trespasser on the cars is not a defence. The plaintiff did not forfeit his life, or subject himself to the loss of his limbs, because he was wrongfully on the car. The defendant owed him no duty of care by reason of any special relation assumed or existing between the company and him, but he was entitled to be protected against unnecessary injury by the defendant or its servants in exercising the right of removing him, and especially from the unnecessary and unjustifiable act of the brakeman by which his life was put in peril, and which resulted in his losing his limb. (*Sanford v. Eighth Ave. R. R. Co.*, 23 N. Y., 343; *Lovett v. Salem, etc., R. R. Co.*, 9 Allen, 557; *Holmes v. Wakefield*, 12 id., 580.)

No error of law was committed on the trial, and the judgment of the General Term should be affirmed, with costs.

All concur.

Judgment affirmed.

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HORATIO N. SLATER et al., Respondents, v. JOHN W. MERSEREAU, Appellant.

A contractor for the erection of a building who subcontracts a portion of the work and reserves no control or authority over or right to direct as to the manner of performance, save generally to insist that the work be done according to the terms of the subcontract, is not liable to a third person for an injury caused by the negligent act of the subcontractor.

Where separate and independent acts of negligence of two parties are the direct causes of a single injury to a third person and it is impossible to

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determine in what proportion each contributed to the injury, either is responsible for the whole injury; and this, although his act alone might not have caused the entire injury, and although without fault on his part, the same damage would have resulted from the act of the other.

Defendant contracted to erect a building on land of A. & Co., the work to be done under the direction of an architect named. Defendant sub-contracted the mason work to B. & M., who contracted to cut, when directed, a recess in the wall to receive a waste pipe to convey water from the roof to a sewer. B. & M. not having received directions did not cut the recess after the roof was on, and in consequence the water from the roof, during a rain storm, ran into the cellar where it was joined by water from the street, let in through the negligence of B. & M. in constructing an area in front of the building. The water found its way through the walls into plaintiffs' building adjoining, injuring their goods. In an action to recover damages for the injury, *held*, that the power given to the architect for the protection of the owner to direct was simply as to the fitness of the materials and the manner the work was done, not as to the time; that it was defendant's duty to direct the necessary work to be done to convey off the water from the roof, and it was negligence on his part in failing to do so in proper time; that he was not liable for the negligence of B. & M. in constructing the area, but as their acts of negligence and his own united to cause the injury he was properly held liable for the whole.

(Argued January 25, 1876; decided February 8, 1876.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, affirming a judgment in favor of plaintiff entered upon the report of a referee. (Reported below, 5 Daly, 445.)

This action was brought to recover damages for injuries alleged to have resulted from defendant's negligence.

The referee found, substantially, the following facts: That the plaintiffs were lessees and occupants of the first floor and basement of certain premises in the city of New York. That the defendant, on or about the 8th day of April, 1868, entered into a contract with Daniel Appleton & Co., who were then the owners of lots next adjoining the premises occupied by the plaintiffs, by which contract the defendant agreed to erect and finish a new building on said lots agreeably to certain drawings and specifications made by B. W. Warner, architect, in a good, workmanlike and substantial

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manner, to the satisfaction and under the direction of the said architect to be testified by a writing or certificate. That on or about the 8th day of April, 1868, defendant entered upon the performance of said contract, and until after the 21st day of July, 1868, continued by himself and his sub-contractors in the performance of the same. That the defendant, at or soon after he entered into said contract, made contracts with various persons for the performance of certain portions of the work. Among others he made a contract with Moore & Bryant, similar in form to that entered into between himself and Appleton & Co., whereby said Moore & Bryant agreed to furnish the materials and do the mason work in the erection of said building, and it was provided that the said Moore & Bryant should do all the cutting away for and repairing after plumbers, gas fitters, furnacemen, etc., as should be directed; and also made a contract with the firm of McKensie & Co. for furnishing the materials for and completing and finishing all the plumbers' work and gas fitting, which included the putting up of the leader from the roof to the sewer in the street. That the defendant reserved to himself and performed the carpenters' work, including the rafters and planking of the roof thereof, and that the defendant was daily at said building during its erection and knew, from day to day, the progress made in and the condition of its erection in all its departments. That the architect named was paid for his services, as architect, by said Daniel Appleton & Co. That on or about the 21st day of July, 1868, the plaintiffs had dry-goods, of which they were the owners, in the basement of the said premises, Nos. 115 and 117 Franklin street, of the value of about \$100,000. At this time the defendant had completed all the carpenter work of the roof, and the same had been covered. The plumbers had constructed a pipe connected with the roof which was carried some distance below the roof down the wall of the building, and which it was intended to connect with the sewer by a continuation of the pipe. The pipe, however, could not be continued until the wall, down which it was carried, was cut to accommodate

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it. This cutting, by the contract of Moore & Bryant, was to be done by them as should be directed. The defendant had failed to direct Moore & Bryant to make the necessary cuttings in the wall; and failed and omitted to provide any means for carrying off the rain water which might and did fall upon said roof; and on or about the said 21st day of July, 1868, large quantities of rain water which had fallen upon the roof ran into the cellar and soaked through into plaintiff's premises, and as matter of fact he found this to have been negligence on the part of the defendant.

That Moore & Bryant had erected the vault and sidewalks in front of said buildings in such a negligent way as to permit large quantities of rain water to flow from the surface of the street upon said lots, uniting with that from the roof, and soaked through into the plaintiff's premises, injuring their stock of goods.

As conclusion of law, the referee found defendant liable for the damage.

*Nathaniel C. Moak* for the appellant. Defendant was not liable for the consequential damage arising from the use of the land in erecting the Appleton building. (*Marvin v. Brewster I. M. Co.*, 55 N. Y., 556, 557; *Johnson v. Oppenheim*, id., 285; *Radcliff v. Mayor of Bklyn.*, 4 id., 203; *Rixley v. Clark*, 32 Barb., 274; *Rockwood v. Wilson*, 11 Cush., 221; *Bates v. Smith*, 100 Mass., 181; *Fletcher v. Ryland*, L. R., 3 H. L. Cas., 330; *Gannon v. Hagadorn*, 10 Al., 109, 110; *Flagg v. Worcester*, 13 Gray, 603, 604; *Goodall v. Tuttle*, 29 N. Y., 439, 467; 1 Den., 524; 32 Penn. St., 699; 2 Black, 418, 423, 424; 5 Scott's N. R., 79.) Defendant's omission to give directions during the construction of the building was not negligence on his part. (*Forsyth v. Hooper*, 11 Al., 419; *Cincinnati v. Stone*, 5 Ohio [N. S.], 38; *Pack v. Mayor, etc.*, 4 Seld., 222; *Barry v. City of St. Louis*, 17 Mo., 121; *Cuff v. N. and N. Y. R. R. Co.*, 9 L. Reg. [N. S.], 548; 3 Alb. L. J., 261.) The storm having occurred at an unusual time and being unex-

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pected by defendant, he should not be held responsible for damages arising from it. (*Calkins v. Barger*, 44 Barb., 424; *Stuart v. Hanoley*, 22 id., 619.) Defendant was not liable for the entire damages. (20 Barb., 479; 1 Den., 495; 17 Wend., 562.)

*F. H. Churchill* for the respondents. Defendant was liable, though not negligent, for all damages, even from those proceeding from natural causes. The proposition that the damages were providential, cannot be sustained. (*Hay v. Cohoes Co.*, 2 Comst., 159; *Tremain v. Cohoes Co.*, id., 163; *Woodward v. Aborn*, 35 Me., 271; *Pixley v. Clark*, 35 N. Y., 520; Washb. on Easements, 357, § 6; *Bentz v. Armstrong*, 8 W. & S., 40; *Thomas v. Kenyon*, 1 Daly, 141; *Nelson v. Godfrey*, 12 Ill., 20.) The person or persons in fault are liable for the results of the negligence. (*Bellows v. Sackett*, 15 Barb., 96, 102; *Thomas v. Kenyon*, 1 Daly, 132; *Bentz v. Armstrong*, 8 W. & S., 40; *Nelson v. Godfrey*, 12 Ill., 20; *Webb v. R., W. and O. Co.*, 49 N. Y., 420; *Pixley v. Clark*, 35 id., 520; *Woodward v. Aborn*, 35 Me., 271; *Sutton v. Clark*, 6 Taunt., 29; *Reynolds v. Clark*, 2 Ld. Raym., 1399; *Smith v. Fletcher*, 4 L. J., C. L. Exch. [N. S.], 193.) It was no defence for defendant, as regards his individual negligence, that he had contracted with McKensie & Co. to supply the means for carrying off the water. (S. & R. on Neg., §§ 15, 84; *Hole v. S. and S. R. W. Co.*, 3 L. J., C. L. Exch., 81; 6 H. & N., 488; *Goudier v. Comstock*, 2 E. D. S., 254; *City of Buffalo v. Holloway*, 3 Seld., 493; *Storrs v. City of Utica*, 17 N. Y., 104; *McCleary v. Kent*, 3 Duer, 27, 34, 35.) Defendant having participated in the negligence in the construction of the building is separately liable for all damages caused, whether those who participated with him were his agents or servants or acted independently of him. (*Creed v. Hartmann*, 29 N. Y., 591, 597; S. & R. on Neg., § 58; *Guille v. Swan*, 19 J. R., 381; *Low v. Mumford*, 14 id., 426; *Colgrove v. N. Y. and H. R. R. Co.*, 6 Duer, 382; 20 N. Y., 492; *Barrett v. Third Ave. R. R. Co.*, 45 id., 628; *Chapman v. N. H. R. R. Co.*, 19 id., 341; *Webster v. H. R. R.*

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*R. Co.*, 38 id., 260.) Defendant was not released from liability by having employed the so called subcontractors. (*Blake v. Ferris*, 1 Seld., 48; *Pack v. Mayor, etc.*, 4 id., 222; *Kelly v. Mayor, etc.*, 1 Kern., 432; *McCleary v. Kent*, 3 Duer, 27, 34; *O'Rourke v. Hart*, 7 Bosw., 511; *Goudier v. Comarch*, 2 E. D. S., 254; *Cuff v. N. and N. Y. R. R. Co.*, 9 L. Reg. [N. S.], 541; *Overton v. Freeman*, 11 C. B., 867; *Rapson v. Cubitt*, 9 M. & W., 710; *Burgess v. Gray*, 1 C. B., 578; *Chicago City v. Robbins*, 2 Black [U. S.], 418.) There was nothing in the position, duties or acts of the architect which relieved defendant from liability. (*Pack v. Mayor, etc.*, 4 Seld., 222; *Kelly v. Mayor, etc.*, 1 Kern., 432; *Steel v. S. E. R. W. Co.*, 16 C. B., 550; *Barry v. City of St. Louis*, 17 Mo., 121; *Gardner v. Bennett*, 38 N. Y. S. C., 202, 203; S. & R. on Neg., § 78.)

MILLER, J. The defendant, as a contractor being in possession and having the control of the premises of Appleton & Co., by the authority of the owners, for the purpose of erecting buildings upon and improving the same, in the performance of his contract possessed the same rights as the owner, and was chargeable for a want of due care and for negligence in the exercise of his rights, if by means thereof the property of the plaintiffs was injured.

The referee found that the water which flowed into the cellar of the building and injured the plaintiffs, came from the roof by means of the failure of the defendant to direct Moore & Bryant, who were subcontractors, to make the necessary cuttings in the wall for the waste pipe which was intended to connect with the sewer, and without which it could not be connected, so that he failed to provide means to carry off the rain water. That this was negligence on the part of the defendant, and that the water which flowed into the building from Franklin street did so in consequence of the manner in which Moore & Bryant had carried on the erection of the vault and sidewalk in front of said building, and that this was negligence on their part.



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He also decided that the defendant was not responsible for the neglect of Moore & Bryant, but as it was impossible to determine in what proportion the water which came from the waste pipe and that which came from the street contributed to cause the damage, and as all parties in fault were responsible, that the defendant was none the less responsible because Moore & Bryant shared his fault, and he reported in favor of the plaintiffs for the damages sustained.

The first question which arises upon the referee's findings is, whether the failure of the defendant to give the proper directions to Moore & Bryant was such negligence as made him answerable for the damages which ensued. The contract of Moore & Bryant, with the defendant, provided that they should do all the cutting away for repairing after plumbing, etc., as "they should be directed." It necessarily follows from the terms of the contract that the defendant was bound to give such directions as were required to prepare the same, and upon a failure to do so, that he should be held responsible for the damages which ensued by reason of his neglect in this respect. According to this condition, the defendant exercised a supervisory control over the progress of the work, and it was a part of his duty to see that it was conducted properly and with the exercise of ordinary care and skill, so as to prevent injuries to other parties. It is said that by the contract between the defendant and the owners, and between the defendant and the subcontractors, the architect had the sole power to give such directions and did so, and if any damage resulted he is chargeable with the same. It is true that the contract of the defendant with the owner provides for the performance of the work agreeably to the drawings and specifications made by the architect within the time named, in a workmanlike and substantial manner to the satisfaction and under the direction of the architect. But this provision evidently contemplated a general supervision for the purpose of determining whether the construction of the building proceeded in accordance with the contract, so as to enable the architect to give the proper certificates when satis-



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fied. It was not intended to give the architect the absolute and entire control, but for the protection of the owner and as an umpire between the parties, to enable him to determine as to the fitness of the materials, the manner in which the work should be conducted, and to see that the contract was satisfactorily completed as provided.

It is said that even if the duty devolved on the defendant to give directions to cut the recess, that this obligation was substantially complied with. The referee has found otherwise, and there is no such preponderance of evidence as would justify a disregard of his finding in this respect. As the defendant knew that this recess was necessary and had not been made, and as he did not give the proper directions nor provide other temporary means as he was lawfully bound to do, by which the rain could be carried off, the conclusion is irresistible that he was negligent, and liable to answer for the damages caused by means of such negligence.

The liability of the defendant for damages caused by the failure of Moore & Bryant to protect the sidewalk, by reason of which the water flowed upon the plaintiffs' premises presents a more difficult question. I concur with the referee's finding, that the responsibility which resulted devolved upon them, and for their neglect in not taking the proper steps to prevent the water from injuring the plaintiffs, the defendant was not liable. He was under no obligation by his contract to give any directions as to this portion of the work, and he had no control or authority over the mode or manner of its performance, and only a right to insist generally that the work be done according to the terms of the contract. He stood in the same relation to Moore & Bryant, as the owner of the building occupied towards him. The work was to be performed by the subcontractor, and the defendant was not bound to give directions in regard to its details, except as specially provided for. He was not in the position of one who employs others to help him in prosecuting a piece of work and to perform the same under his control and direction, and who as the superior of the workmen

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is responsible for their conduct ; nor did he stand in the relation of master or principal to the subcontractor, by whose negligent act the injury was in part occasioned. In *Overton v. Freeman* (11 C. B. [73 Eng. C. L.], 867), it was held, that the contractor was not responsible, where he had entered into a subcontract to pave a street, for injuries caused by the negligence of the latter. It was said that the "case falls within the principle of those authorities which have decided that the subcontractor, and not the person with whom he contracts, is liable civilly as well as criminally for any wrong done by himself or his servants in the execution of the work contracted for." When the subcontractor is negligent while acting independently and the main contractor in no way sanctions the doing of the act complained of, the latter is not responsible. (See also, *Burgess v. Gray*, 1 C. B. [50 E. C. L. R.], 577 ; *Rapson v. Cubitt*, 9 M. & W., 710.) I have examined the cases which are cited to sustain the liability of the contractor for the acts of a subcontractor, and none of them uphold the doctrine contended for in a case which bears the essential features of the one now considered.

The defendant not being liable for the negligence of Moore & Bryant, as subcontractors, could he be liable for the damages which followed, upon the ground stated by the referee in his report ? It is true the defendant and Moore & Bryant were not jointly interested in reference to the separate acts which produced the damages. Although they acted independently of each other, they did act at the same time in causing the damages, etc., each contributing towards it, and although the act of each, alone and of itself, might not have caused the entire injury, under the circumstances presented, there is no good reason why each should not be liable for the damages caused by the different acts of all. The water from both sources commingled together and became one body concentrating at the same locality, soaking through the wall into the plaintiffs' premises and injuring the plaintiffs' property ; and it cannot be said that the water which the defendant's negligence caused to flow upon the plaintiffs' premises, and

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which became a portion of all which came there, did not produce the damages complained of. The water with which each of the parties were instrumental in injuring the plaintiffs was one mass and inseparable, and no distinction can be made between the different sources from whence it flowed, so that it can be claimed that each caused a separate and distinct injury for which each one is separately responsible. The case presented is not like that where the animals belonging to several owners do damage together, and it is held that each owner is not separately liable for the acts of all, as there is only a separate trespass or wrong against each. (*Van Steenburgh v. Tobias*, 17 Wend., 562; *Auchmuty v. Ham*, 1 Den., 495; *Partenheimer v. Van Order*, 20 Barb., 479.) No such division can be made of the separate acts in the case at bar, and it bears some analogy to that of *Colgrove v. N. Y. and H. and N. Y. and N. H. R. R. Co.* (6 Duer, 382; 20 N. Y., 49), where the injury was caused by concurring negligence in the management of the trains of two railroad companies which came in collision, and the defendants were held jointly liable. The collision was but a single act caused by the separate negligence of different parties, which together produced the result. Here also the contractor and subcontractors were separately negligent, and although such negligence was not concurrent, yet the negligence of both these parties contributed to produce the damages caused at one and the same time. It is no defence for a person against whom negligence which caused damage is proved, to prove that without fault on his part the same damages would have resulted from the act of another (*Webster v. H. R. R. R. Co.*, 38 N. Y., 260); and as the case stands the referee was justified in holding that the defendant was responsible for the entire damages.

There was no error in the admission or rejection of evidence, and no ground is shown for reversing the judgment.

Judgment affirmed, with costs.

All concur.

Judgment affirmed.

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Statement of case.

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AARON HARRIS, Plaintiff in Error, v. THE PEOPLE, Defendants in Error.

Under the provision of the act of 1873 to reorganize the local government of the city of New York (§ 76, chap. 335, Laws of 1873), providing for investigations as to the origin of fires in the city, the fire marshal has all the power as to such investigations conferred upon the superintendent of police by the act of 1852 (§ 1, chap. 332, Laws of 1852), as amended in 1857 (§ 37, chap. 569, Laws of 1857), and also the authority conferred upon the metropolitan fire marshal by the act of 1868 (chap. 563, Laws of 1868).

The fire marshal has jurisdiction under said statutes to institute an investigation as to the circumstances of a fire in the city without a complaint being made to him. The only fact necessary to call into exercise his jurisdiction is that the fire has occurred.

In an indictment for perjury alleged to have been committed on an investigation before the fire marshal, it was alleged that the accused swore there were 60,000 cigars in the building at the time of the fire. The proof was that he swore there were 65,000 cigars. This was one of various items of property as to which the accused was charged with having sworn falsely. On error it was objected that there was a fatal variance between the indictment and the proof. The objection was not taken on the trial. *Held*, that it was not available here, as if made upon the trial, the evidence as to this item could have been excluded or waived, and the jury directed to disregard it, and the conviction could have been sustained upon the proof as to the other items. Also, *held*, that the variance was not material.

When an indictment charges that the accused has sworn falsely as to several facts, it is not necessary to prove all that is charged. It is sufficient to prove enough to make out the offence.

There were two counts in the indictment, the first charging perjury in the oral testimony given before the fire marshal, and the other perjury in swearing to an affidavit before the same officer, containing in substance the same matters as testified to orally.

The jury found the prisoner not guilty under the first count and guilty under the second. It was claimed that the verdict was inconsistent. It appeared that a portion of the oral testimony was taken when the fire marshal was not present. *Held*, that the objection was untenable, as the jury may have found that the oral testimony alleged to be false was not taken before the marshal.

(Argued January 26, 1876; decided February 8, 1876.)

ERROR to the General Term of the Supreme Court in the first judicial department to review judgment affirming a

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judgment of the Court of General Sessions of the city and county of New York, entered upon a verdict convicting plaintiff in error of the crime of perjury. (Reported below 4 Hun, 1.)

The plaintiff in error was indicted for perjury alleged to have been committed by him upon an investigation before the fire marshal of the city of New York as to the origin of a fire which had occurred in the said city. The indictment contained two counts, one charging perjury in the oral testimony given by plaintiff in error, the other perjury in an affidavit sworn to by him. The facts alleged to have been sworn to, and which were charged to be false, were similar in both counts, among others that the accused falsely swore that at the time of the fire there was upon the premises "a stock consisting of 60,000 cigars, 185,000 cigarettes, 400 pounds weight of Havana tobacco, of the value of one dollar and fifty cents each pound, and 645 pounds of Virginia tobacco of the value of sixty-five cents each pound."

Upon the trial it was proved that the accused swore that there were 65,000 cigars, and the other items of property stated, upon the premises.

The other facts pertinent to the questions presented sufficiently appear in the opinion.

The jury found the accused not guilty upon the first count and guilty upon the second.

*Ira Shafer* for the plaintiff in error. The fire marshal had no power or authority to administer the oath to Harris. (Laws 1873, chap. 335, §§ 76, 504; Laws 1870, p. 899, § 114; Laws 1868, chap. 563; Laws 1871, p. 1277, § 4; 2 R. S. [5th ed], 990, § 19; id., 681, § 1; 3 id., pp. 993, 999; Barb. Cr. Law [2d ed.], 519, 529, 122, 193.) The variance between the indictment and proof was fatal. (Rosc. Ev. [5th Am. ed.], 816, 820; *Taylor's Case*, 1 Campb., 404.) The two counts of the indictment charged the same offence. (Barb. Cr. Law, 339, 340; *People v. Wright*, 9 Wend., 193; *Kane v. People*, 8 id., 203; 12 id., 425.) The verdict was repugnant, inconsistent and

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void. (Barb. Cr. Law, 361; 1 Chit. Cr. Law, 690; 6 Hawk., ch. 4, § 8, p. 202; Stark., 332, 333; *O'Connell v. The Queen*, 11 Cl. & F., 155; *Hayworth v. State*, 14 Ind., 590; *State v. McCue*, 39 Mo., 112; *People v. Ah Fe*, 31 Cal., 951; *Guenther v. People*, 27 N. Y., 100; *State v. Lorumbo*, Harper [Va.], 183; *Allen v. Foster*, 9 Foster [N. H.], 163; *Jewitt v. Davis*, 6 N. H., 518; *Holman v. Kingsbury*, 9 id., 109; *Coffin v. Jones*, 11 Rich., 95; *Brunswick v. McKean*, 4 Greenl., 508; *Hurley v. State of Ohio*, 6 Ohio, 399, 403, 404; Jones R., 163; Caines' Ab., 978.)

*Benj. K. Phelps*, district attorney, for the defendants in error. The fire marshal had power to administer the oath to the plaintiff in error. (Laws 1870, chap. 383, § 44; Laws 1873, chap. 335, § 76.) There was no material variance between the charges of the indictment and the proof. (*People v. Warner*, 5 Wend., 271; *Tuttle v. People*, 36 N. Y., 431; *Tomlinson's Case*, 4 C. H. Rec., 125.)

EARL, J. The plaintiff in error was convicted of perjury in the General Sessions of the city and county of New York, and was sentenced to ten years imprisonment in the State prison. The perjury is alleged, in the indictment, to have been committed on the 13th day of September, 1873, before George H. Sheldon, fire marshal of the city, who was, at the time, investigating the cause, origin and circumstances of a fire which occurred on the 5th day of September, 1873, in a building occupied by Harris and his partner as a tobacco manufactory.

Upon the investigation, Harris swore that at the time of the fire he was not in the city of New York, but that he was in the city of Troy. He also swore that, at the time of the fire, there was in the building a stock, belonging to him and his copartner, consisting of 65,000 cigars; 185,000 cigarettes; 400 pounds of Havana tobacco, of the value of one dollar and fifty cents per pound; 645 pounds of Virginia tobacco, of the value of sixty-five cents per pound; and that he and

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his partner sustained a loss by the fire of between \$5,000 and \$6,000. The facts thus sworn to were alleged in the indictment to have been false, and evidence was given upon the trial tending to show that they were all false.

It was claimed upon the trial, on behalf of the prisoner, that the fire marshal had no power or authority to administer an oath to Harris, and this is the first ground of error alleged here. To show that it has no foundation, little more is needed than to bring together the statutes relating to the powers and duties of the fire marshal.

It was provided, by section 1, chapter 332 of the Laws of 1852, as amended by section 36, chapter 569 of the Laws of 1857, that the general superintendent of police of the city of New York was "authorized and required to make an investigation into the origin of every fire occurring in said city," and for that purpose he was invested with the same powers and jurisdiction as were possessed by the police justices of the city. The police justices had jurisdiction, upon complaint made to them, to subpoena and swear witnesses for the purpose of ascertaining whether any crime had been committed. (2 R. S., 707.) In 1868 (chap. 563) an act was passed creating the "office of metropolitan fire marshal, and prescribing its powers and duties." He was to be appointed by the board of metropolitan police. And section 2 made it his duty "to examine into the cause, circumstances and origin of fires by which any building, vessels, vehicles or any valuable personal property shall be accidentally or unlawfully burned, destroyed, lost or damaged, wholly or partially; and to especially inquire and examine whether the fire was the result of carelessness or the act of an incendiary." He was directed to take the testimony, on oath, of all persons supposed to be cognizant of any facts or to have means of knowledge in relation to the matter to be examined and inquired into, and to cause the same to be reduced to writing and verified. By section 3, he was empowered to issue a notice, in the nature of a subpoena, to compel the attendance of any person, as a witness, before him to testify in relation



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to any matter the subject of inquiry and investigation by him. He was authorized to administer oaths to the witnesses, and it was provided that false swearing in any matter or proceeding before him should be deemed perjury, and punishable as such. The next statute upon the subject was passed in 1870 (chap. 383, § 21), and simply provided that the board of police of the city of New York should have the power to appoint a fire marshal, who should have the like powers and perform the like duties as those provided by the statute of 1868 above referred to. In 1871, by section 4, chapter 584, it was provided that all the provisions of the statute of 1868 "creating the office of metropolitan fire marshal, and prescribing the powers and duties thereof, shall be and remain in force so far as applicable;" and that "for the purpose of investigating the origin of fires, incendiary or otherwise, and bringing to punishment the parties guilty of arson, the said fire marshal is hereby invested with the same powers and jurisdiction as were heretofore conferred upon the superintendent of police of the city of New York in relation thereto" under the statute of 1852, as amended in 1857, above referred to. By section 76, chapter 335 of the Laws of 1873, an act to reorganize the local government of the city of New York, it was provided as follows: "Another bureau shall be charged with the investigation of the origin and causes of fires, the principal officer of which shall be called fire marshal, who shall possess all the powers and duties now possessed and performed by the fire marshal appointed pursuant to chapter 383, Laws of 1870, and chapter 584, Laws of 1871, and the acts amendatory or supplementary thereof."

The claim made on behalf of the plaintiff in error is, that under these statutes the fire marshal had no authority to institute an investigation and inquiry into the circumstances of a fire without a complaint is first made to him. It is entirely clear, however, from the language used, as well as from a consideration of the purposes of the statutes, that a complaint is not necessary to call into action the powers of the fire



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marshal. He has all the authority conferred by the statute of 1852, as amended in 1857, upon the superintendent of police. That statute conferred the authority and imposed the duty to investigate. No complaint was necessary, but in conducting the investigation the superintendent was invested with the powers and jurisdiction of police justices, and they had authority to subpoena witnesses and swear them. He also had the authority conferred by the statute of 1868, which made it his duty to institute the investigation, and did not impose, as a preliminary, any complaint. These statutes were a portion of the police regulations for the city. Their design was to protect the city against fires, both accidental and incendiary, and an officer was clothed with ample powers to accomplish the purpose, and the only thing required to call into exercise his jurisdiction was a fire within the city limits.

It is also claimed that there was a fatal variance between the indictment and the proof, in that the indictment alleges that Harris swore before the fire marshal that there were 60,000 cigars in the building at the time of the fire, whereas the proof showed that he swore that there were 65,000. This objection was in no form made at the trial, and therefore cannot avail here. If it had been made, the evidence as to that item could have been excluded or waived, or the judge could have instructed the jury to disregard the evidence, and there would still have been enough to uphold a conviction. The variance was as to one of a number of distinct items as to which Harris was charged with swearing falsely, and if the jury had found that he swore falsely as to the other items, or as to any one of them, a verdict of guilty would have been proper. Where an indictment charges that the prisoner has stolen a number of articles, or has inflicted a number of blows, or has obtained goods by a number of false pretences, or has sworn falsely in an affidavit as to several facts, it is not necessary to prove all that is charged. It is sufficient to prove enough to make out the offence charged. (3 Russell on Cr. [4th Lond. ed.], 105; *Reg. v. Rhodes*, 2 Lord Ray., 886; 3 Starkie's Ev., 860; *Tomlinson's Case*,

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4 City Hall Rec., 125; Roscoe's Cr. Ev. [6th Am. ed.], 763.)

We are also of opinion that the variance was not material, and could be disregarded. And, for the purpose of testing this question, we must treat the case as if the indictment contained no other charge of perjury. The strictness of the ancient rule as to variance between the proof and the indictment has been much relaxed in modern times. Variances are regarded as material, because they may mislead a prisoner in making his defence, and because they may expose him to the danger of being again put in jeopardy for the same offence. The variance here could present no such difficulty. The indictment charged him with swearing falsely that he had 60,000 cigars in the building when, in fact, he swore that he had 65,000 there — a mistake in his favor. The falsehood did not consist so much in swearing to the precise number, for as to that he could be innocently mistaken, and preciseness was not important, but it consisted in swearing to a much larger number than he had. If the indictment had charged him with swearing falsely that there were 65,000, and he had proved that he actually had in his building 60,000, his oath would, considering the purpose for which and the circumstances under which it was given, have been regarded as substantially true, and the variance immaterial. (*People v. Warner*, 5 Wend., 271.)

There were two counts in the indictment, the first charging perjury in the oral testimony given before the fire marshal, and the second charging perjury in swearing to an affidavit before the same officer, containing, in substance, the same matters testified to orally. The jury found the prisoner not guilty under the first count, and guilty under the second count. It is now claimed that the verdict was repugnant, inconsistent and void; that the prisoner could not be innocent under the first count and guilty under the second. The facts do not warrant the claim made. The two counts were not alike. The first was for oral false swearing, and the second was for false swearing in the affidavit. The fire mar-

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shal was not present when the oral evidence was all given. The material facts of the oral evidence may have been taken by his assistant in his absence; and hence the jury may have well found that, as to the oral evidence, the false swearing charged did not take place before the fire marshal, and hence that the prisoner was not guilty as to that; and hence there is no repugnancy or inconsistency in the verdict of guilty under the second count based upon the affidavit.

Having thus carefully considered all the objections to which our attention has been called, we have reached the conclusion that the conviction must be affirmed.

All concur.

Judgment affirmed.

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CHARLES B. FRANK, Respondent, v. GERHARD WESSELS,  
Appellant.

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| 64  | 155 |
| 110 | 476 |

A written instrument acknowledging the receipt of a specified sum of money in paper currency for account of a person named, and promising to pay the same to such person or order "on return of this receipt" with interest, is a negotiable promissory note. The words "on return of this receipt" do not make it payable upon a contingency or constitute a condition precedent; and its being payable in paper currency will be taken as meaning legal tender paper currency.

Where such an instrument is lost and an action is brought thereon, the defendant is entitled to the indemnity provided by statute (2 R. S., 406, § 75) in actions upon lost negotiable instruments; and this, although it appears that the instrument has not been indorsed; indemnity must be given without regard to the fact of actual negotiation.

(Argued January 26, 1876; decided February 1, 1876.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, affirming a judgment in favor of plaintiff entered upon a verdict.

The complaint in this action alleged, in substance, that plaintiff's assignor, William Feist, delivered to defendant certain money to the amount of \$2,496 to be repaid on

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demand, with interest, defendant delivering a receipt or certificate of deposit therefor; that defendant refused to pay on demand. The instrument delivered by defendant was as follows:

“NEW YORK, *February* 4, 1871.

Received from Straut Bros. for account of Mr. W. Feist, carpenter, of Greytown, Nicaragua, twenty-four hundred and ninety-six, twenty-six one-hundredths dollars, paper currency, which I promise to pay to said W. Feist, or to his order, on return of this receipt, with seven per cent per annum interest.

\$2,496.26, paper currency.

(Signed.) G. WESSELS.”

The instrument was not produced; plaintiff's assignor, Feist, testified that it was stolen from him; also, that it was not indorsed by him when taken.

On the trial defendant's counsel moved for a nonsuit on the ground that plaintiff was not entitled to recover without a return of the instrument or indemnity given. The motion was denied and the court directed a verdict for plaintiff, which was rendered accordingly.

*Samuel Hand* for the appellant. No recovery could be had against defendant without a return of the instrument in suit. (*Cartledge v. West*, 2 Den., 377; *Porter v. Rose*, 12 J. R., 209.) Even if the instrument did not provide that a return must be made before payment, no recovery could be had without first giving or tendering a bond of indemnity when the demand was made. (*Desmond v. Rice*, 1 Hill, 530; *Smith v. Rockwell*, 2 id., 482; *Van Alstyne v. Coml. Bk.*, 4 Abb. Ct. App. Dec., 456; 2 R. S., 406, §§ 75, 76.)

*Sidney S. Harris* for the respondent. If the instrument was not a negotiable promissory note indemnity could not be demanded. (*Wright v. Wright*, 54 N. Y., 437.) No indemnity was required. (*Payne v. Gadner*, 29 N. Y., 146, 167, 171; *Payne v. State*, 39 Barb., 639; *Herrick v. Woolverton*, 41 N. Y., 595, 600, 601; *Graves v. Dudley*, 20 id., 74;

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*Marsh v. Oneida Bk.*, 34 Barb., 298; *Sand v. Seamen Ins. Bk.*, 37 id., 129; 1 Am. L. Cas., 307; *Silbree v. Tripp*, 15 M. & W., 23; *Horns v. Redpearce*, 4 Bing. N. C., 433; *Patterson v. Poindexter*, 6 W. & S., 227; 8 id., 353.) Plaintiff can recover even if the instrument is a negotiable note. (Edw. on Bills, 301, 302; *Depew v. Wheelan*, 6 Blackf., 485; *Rolf v. Watson*, 4 Bing., 273; *Colson v. Arnot*, 57 N. Y., 253; 17 id., 205; *Canal Bk. v. Bk. of Albany*, 1 Hill, 287; *Hopkins v. Adams*, 20 Vt., 407; 1 Story's Eq. [9th ed.], § 86 a; *Pintard v. Packington*, 10 J. R., 104; *Ball v. Rowley*, 3 Cow., 303.) Plaintiff was entitled to recover upon the instrument in suit. (10 J. R., 104; 2 Camp. N. P., 211, note; 6 Ves., 812; 3 Cow., 303; 6 Blackf., 485; *Thayer v. King*, 15 Ohio, 292; *Samson v. Plaff*, 1 Handy, 444; *Long v. Baillie*, 2 Camp., 214, note; *Rolt v. Watson*, 4 Bing., 273; *Whitesides v. Wallace*, 2 Speers, 193; 1 Leigh N. P., 471; *Branch Bk. v. Tillman*, 22 Ala., 114; *Hopkins v. Adams*, 20 Vt., 407; 12 id., 443; 20 id., 455; 1 R. I., 401; 42 Me., 450; 40 id., 74; *Hansard v. Robinson*, 7 B. & C.; 2 Hill, 295; id., 482; 3 Cow., 303; 2 Wend., 550.) The provision that payment should be made upon the return of the instrument added nothing to it. (*Bennett v. Pixley*, 7 J. R., 249; *Peffer v. Haight*, 20 Barb., 429; 5 id., 161; 6 id., 386; 1 Seld., 247.)

CHURCH, Ch. J. The only question in this case is whether the defendant was entitled to indemnity, as provided by statute, in actions upon lost negotiable notes. (2 R. S., 406.) It was not necessary to offer indemnity before action brought. It is sufficient to give it before recovery. I infer that the learned judge intended to decide that the plaintiff could recover without giving indemnity. The case states that the plaintiff's counsel said that the plaintiff would give a bond if required. The defendant's counsel then moved for a nonsuit on the ground (among others) that indemnity had not been offered; and the court directed a verdict for plaintiff without requiring him to deliver the bond.

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The counsel insists that the plaintiff is not bound to furnish indemnity for various reasons :

First. That the certificate or instrument, in this case, is not a negotiable promissory note. I think it is. It contains an express promise to pay Feist, or order, a specified sum of money, upon demand, with interest. These are the statutory elements of such a note. (1 R. S., 721, § 1.)

The words, "on the return of this receipt," do not make it payable upon a contingency, or constitute a condition precedent to any payment. If they did, no recovery could be had without a return of the certificate. This restriction would be implied if not expressed; it is implied in every promissory note; and there is also an implied exception, on account of mistake or accident. When these occurred courts of equity formerly enforced the obligation upon such terms of indemnity as was deemed just; and now courts of law may enforce it upon requiring the observance of the statutory indemnity. This clause is not of the essence of the contract, but is inserted for the convenience and safety of the maker. In the case of *Patterson v. Poindexter* (6 Watts & S., 227) there was no express promise to pay; and the intimation as to the effect of the clause requiring a return is not authoritative, and has not been followed in this State or elsewhere. (Parsons on Bills and Notes, 26, and cases cited.) In 29 New York, 146, the principal question was, whether a demand was necessary before action brought upon such a certificate. The objection that the instrument is not a promissory note, because payable in paper currency, is answered by the suggestion that this must be taken to refer to the legal tender paper currency, which under the United States laws and decisions is money.

It is also urged, that as Fiest testified that the certificate had not been indorsed, the defendant could not be injured, and therefore no indemnity was necessary. Before the statute, the fact of negotiability, or that the instrument had been negotiated must have been proved. The presumption was the other way. The statute was passed to remedy such cases, and provides that if the action is on a negotiable note, indem-

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nity must be given without regard to the fact of actual negotiation. The authorities cited by the counsel upon this point do not answer the unqualified requirement of the statute. The action is, substantially, on the instrument. The complaint alleges the loan of the money, the taking of the instrument and the transfer to the plaintiff. I think that the defendant was entitled to indemnity within the spirit and intent of the statute; but I agree with the counsel for the plaintiff that there is no necessity for a new trial.

There was no defence made to the action; and a proper disposition of the case is, that if the plaintiff shall, within thirty days, execute and deliver, or offer to the defendant or his attorney a bond of indemnity, approved by one of the judges of the City Court of Brooklyn, the judgment is affirmed, without costs to either party in this court; if not, the judgment is reversed and a new trial granted, costs to abide event.

All concur.

Judgment accordingly.

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JOHN HEERMANS, Trustee, etc., Appellant, v. S. STEWART  
ELLSWORTH, Respondent.

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| 64  | 159  |
| 169 | 1428 |

It is the duty of an assignee of a non-negotiable chose in action, in order to protect himself against a payment by the debtor to the original creditor, to notify the former of the assignment; and in an action upon the demand where such a payment is established, the burden of proving notice prior to payment is upon the plaintiff.

One F. transferred to plaintiff by deed in trust, among other things, a demand against defendant for money loaned. F. subsequently brought suit against plaintiff to set aside the trust, in which action defendant was sworn as a witness. Plaintiff succeeded in the litigation. In an action upon the claim defendant proved payment to F. Plaintiff requested the court to charge that the pendency of said action brought by F. was constructive notice to defendant of the existence of the trust deed. The court refused so to charge. *Held*, no error; that whether defendant had notice of the character of the action sufficient to put him upon inquiry was a question of fact for the jury.

(Argued January 25, 1876; decided February 8, 1876.)

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APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below 5 T. & C., 605; 3 Hun, 473.)

This action was brought by plaintiff as trustee claiming under a deed in trust executed by one Joseph Fellows of his property, real and personal, to recover a balance of account for moneys loaned by said Fellows to defendant.

The defence was payment, and defendant proved payment to Fellows after the execution of the trust deed. Prior to the payment an action was brought by Fellows against plaintiff to revoke the trust deed. Defendant was subpoenaed and examined as a witness therein. Other evidence on plaintiff's part tended to show notice. Defendant testified that at the time of the payment he had no knowledge or notice of the trust deed.

Upon the question of notice the court charged as follows: "The burden of proof is upon the plaintiff upon this question, and it is incumbent upon him to establish the fact of notice by a fair preponderance of evidence. If the testimony is simply balanced, the defendant is to prevail." To which charge plaintiff's counsel duly excepted. Said counsel requested the court to charge that the burden of proof was upon the defendant, to show that the payment was made without notice and in good faith. The court refused so to charge, and the plaintiff's counsel duly excepted. Said counsel also asked the court to charge that the pendency of the action between Fellows and plaintiff was constructive notice to the defendant and conclusive upon him in this action. The court refused so to charge, and said counsel duly excepted.

*A. Hadden* for the appellant. The defence of payment was an affirmative one, and the burden of proof was upon the party asserting it. (*Hollister v. Bender*, 1 Hill, 150; *Williams v. Walker*, 2 Sandf., 333; *Simson v. Hart*, 14 J. R., 73; *Wakeman v. Grover*, 4 Paige, 23; *Bush v. Lathrop*, 22 N. Y., 550.)



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Opinion of the Court, per MILLER, J.

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*Geo. B. Bradley* for the respondent. The onus was upon plaintiff to show that defendant had notice of the transfer. (*Meghan v. Mills*, 9 J. R., 64; *Anderson v. Van Allen*, 12 id., 343; *Briggs v. Dorr*, 19 id., 343; *Say v. Dascomb*, 1 Hill, 552; *Field v. Mayor, etc.*, 2 Seld., 179, 188; *Leitch v. Wells*, 48 N. Y., 585, 586, 604, 605, 693, 694.)

MILLER, J. There was no error in the charge of the judge upon the trial, that the burden of proof was upon the plaintiff, upon the question of notice, and that it was incumbent upon him to establish the fact of notice; nor in the refusal to charge that the burden of proof was upon the defendant to show that the payment was made without notice and in good faith. The debt was due to Fellows, and he being the creditor, it is a fair legal presumption that such creditor was lawfully entitled to receive payment. If an assignment was made by Fellows to the plaintiff, it was the duty of the assignee to establish that the debtor was notified in order to protect himself against any payment to the original creditor. This rule is fully established by authority. (See *Meghan v. Mills*, 9 J. R., 64; *Anderson v. Van Allen*, 12 id., 343; *Briggs v. Dorr*, 19 id., 95; *Say v. Dascomb*, 1 Hill, 552; *Field v. The Mayor*, 2 Seld., 179.) At common law an action to recover upon an instrument not negotiable, was necessarily brought in the name of the original owner or payee, and if payment was pleaded it was not enough that the replication denied the payment, without averring both the assignment and notice of the transfer before payment. (19 J. R., 95; 1 Hill, *supra*.) Unless this was done the pleading was insufficient and the proof could not be given.

Proof of payment to the creditor establishes a complete defence, and when this is made out it belongs to the other side to answer or avoid it by evidence of the assignment of the demand and notice thereof to the debtor. As he alleges that the payment was not made to the proper person he is bound to establish it. It is entirely evident that the onus is upon him and he has the affirmative upon such an issue.

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*Hollister v. Bender* (1 Hill, 150) is not in conflict with the rule stated. As there said, the substance of the allegation to be tried determines where the onus lies, and as the assignment and notice were the very essence of the plaintiff's right to recover, the burden was upon him. There is no principle of pleading which can disturb or alter the rule laid down. Nor is there any ground for claiming that the necessity for such a rule no longer exists, since parties are allowed to be witnesses on their own behalf. This furnishes no sufficient or satisfactory reason for changing a rule of evidence long established and which is founded upon a settled principle.

The remarks of the learned judge who wrote the opinion in *Bush v. Lathrop* (22 N. Y., 535) have no direct bearing upon the question considered, as that case is not analogous.

Nor was there any error in the refusal to charge the jury that the pendency of the action between Fellows and Heermans was constructive notice to the defendant of the existence of the deed. It is not claimed that it operated as a notice of *lis pendens* strictly, and whether the defendant had notice of the character of the action so as to put him on inquiry, from the fact of his being sworn as a witness in the case, or from any other circumstances, was a question of fact for the jury to determine. The discussion already had disposed of the case and no other question is presented which demands comment.

The judgment was right and should be affirmed.

All concur.

Judgment affirmed.

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HENRY H. BLOSSOM, Respondent, v. THE LYCOMING FIRE  
INSURANCE COMPANY, Appellant.

Defendant issued to plaintiff a policy of fire insurance containing a clause requiring the assured in case of loss to furnish proof thereof within thirty days. A loss having occurred, plaintiff failed to furnish the required proof. An adjuster of defendant within the thirty days visited the premises and made inquiries into the circumstances of the fire.

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| 64  | 162 |
| 133 | 362 |

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| 64  | 162 |
| 166 | 179 |

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This was without authority from defendant and without the knowledge of plaintiff. Upon receipt of proof of loss some four months after the fire, defendant sent a letter to plaintiff's attorney stating that the proof of loss was too late; also, that after careful examination they were satisfied the case was fraudulent, and therefore rejected the claim. In an action upon the policy, *held*, that a refusal of the court to nonsuit plaintiff was error; that proof of loss within the time prescribed was necessary unless waived; and that there was no evidence of a waiver. As to whether the omission of an insurer to raise the objection of a non-compliance with such a condition upon being furnished with proof long after the expiration of the time specified, can be deemed a waiver, *quære*.

(Argued January 27, 1876; decided February 8, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department in favor of plaintiff, entered upon an order denying a motion for a new trial and directing judgment on verdict.

This action was upon a policy of fire insurance.

The policy contained a clause requiring the assured in case of loss or damage by fire to deliver to defendant's secretary, within thirty days after such loss, a particular account thereof under oath. The building insured was destroyed by fire on the 29th November, 1870. No proofs of the loss were furnished until March 29, 1871; these were sent by plaintiff's attorney; defendant sent a letter in reply containing the following: "The proof of loss is too late. It should have been made within thirty days after loss; besides, after a careful investigation of the matter, we have become satisfied that it is a clear case of fraud. The company have, therefore, rejected the claim." Plaintiff gave evidence upon the trial to the effect that one Krouse, an adjuster for defendant, having learned of the fire and being near the premises, went to and examined them, and made inquiries as to the fire. He had received no instructions from the defendant to adjust the loss, and what he did was without plaintiff's knowledge; that he reported his action to the company, but no action was taken by it until receipt of proofs of loss. At the close of the evidence defendant's counsel moved for a nonsuit on the ground, among others,

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that proofs of the loss were not furnished within thirty days thereafter, as required by the policy, and that there had been no waiver shown. The court denied the motion, holding that the question as to waiver was one of fact for the jury; to which ruling defendant's counsel duly excepted.

Exceptions were ordered to be heard at first instance at General Term.

*O. W. Chapman* for the appellant. The full performance by plaintiff of the provision of the policy as to furnishing proofs of loss was a condition precedent to his right to recover. (*Inman v. West. Ins. Co.*, 18 Wis., 387; *Flanders on F. Ins.* [2d ed.], 565, 578; *Owen v. Farmers' J. S. Ins. Co.*, 57 Barb., 518; 3 Rob., 325; 57 N. Y., 500.) This provision was not waived. (*St. L. Ins. Co. v. Kyle*, 11 Mo., 278; *Patrick v. Ins. Co.*, 43 N. H., 621; *Cornell v. Mil. M. F. Ins. Co.*, 18 Wis., 387; *Ripley v. Aetna Ins. Co.*, 30 N. Y., 168; *Underwood v. Farmers' J. S. Ins. Co.*, 57 id., 500; *Lyc. Ins. Co. v. Beaty*, 66 Penn., 9; *Busch v. Ins. Co.*, 6 Phila. Rep., 252.) The letter of Krouse did not create a waiver. (47 N. Y., 114; 57 id., 500; 31 How., 508; 17 N. Y., 428; *Kimball v. Ham. F. Ins. Co.*, 8 Bosw., 495; *Citizens' F. Ins. S. and L. Co. v. Doll*, 6 Am. R., 360; 32 Md., 89; *Edwards v. Balt. F. Ins. Co.*, 3 Gill [Md.], 176.)

*Giles W. Hotchkiss* for the respondent. There was sufficient evidence to justify the court in refusing to nonsuit plaintiff. (*Herron v. Peoria, etc., Ins. Co.*, 28 Ill., 235; *Cornell v. Leroy*, 9 Wend., 163; *Inman v. West. F. Ins. Co.*, 12 id., 452; *Bumpsted v. Div. M. Ins. Co.*, 2 Kern., 81, 92; *N. Y. C. Ins. Co. v. Nat. Pro. Ins. Co.*, 20 Barb., 468, 475; *Kendall v. Hol. P. Ins. Co.*, 2 T. & C., 395; *Edwards v. Balt. F. Ins. Co.*, 3 Gill [Md.], 176.) A waiver was clearly established. (*Flanders on F. Ins.*, 520, § 10; 541, 542, § 22; 545, 546, §§ 26, 27; *Lyc. Ins. Co. v. Schreffer*, 6 Wright [Penn.], 188, 191; *Post v. Aetna Ins. Co.*, 43 Barb., 351, 365; *Owen v. F. J. S. Ins. Co.*, 57 id., 518, 521, 522; *Dohn*

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Opinion of the Court, per ALLEN, J.

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v. *F. J. S. Ins. Co.*, 5 Lans., 275, 277.) The question of waiver was one of fact. (Flanders on F. Ins., 531, § 10; *Fireman's Ins. Co. v. Walden*, 12 J. R., 514; *Sheldon v. At. F. and M. Ins. Co.*, 26 N. Y., 460; *Ripley v. Astor Ins. Co.*, 17 How. Pr., 444.)

ALLEN, J. Several questions of minor importance arise upon the record which we deem it unnecessary to consider for the reason that the point made by the defendant, of the failure of the plaintiff to furnish proof of loss within thirty days after the fire, entitled the defendant to a nonsuit upon the evidence as it stood at the close of the trial. That the condition was not complied with was conceded; that a substantial compliance with that condition, unless waived by the insurers, was necessary to enable the plaintiff to recover, is well established. (*Savage v. The Howard Ins. Co.*, 52 N. Y., 502; *Underwood v. Farmers' J. S. Ins. Co.*, 57 id., 500.) Upon a careful review of the case we can find no evidence of a waiver of this condition by the defendant; there was no communication, direct or indirect, between the plaintiff and defendant, or its agents, in respect to it, or any negotiations between them from which the plaintiff had a right to infer that a strict compliance with every condition of the policy would not be insisted upon. Neither was there proof of any act by the defendant or its agents which could have led the plaintiff to believe that the proofs of loss prescribed by the policy would not be required. The action of Krouse, the adjuster, in visiting the premises and making inquiry into the circumstances of the fire, were not known either to the plaintiff or any agent of his; so that his omission to furnish the proofs was not induced by such action. Had the plaintiff known of the doings of Krouse they could not legitimately have influenced his action or omission to act in respect to the proof. The visit of Krouse was without authority or direction from the defendant, and was rather casual than otherwise, and precautionary, that he might be better able to act understandingly should occasion require.

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He neither by act or by declaration intimated that the defendant would, or was liable to, pay the loss; or that the loss was recognized as a valid claim against the company. In truth there was no communication or negotiation between the plaintiff and the defendant, or its agents, after the notice of the loss, if such notice was ever given, until the forwarding of the proof of loss in April, after the fire, which occurred in November. But stress was laid by the learned judge, in his charge to the jury, upon the letter from the defendant to the attorney for the plaintiff, upon the receipt of the proof of loss, some four months after it occurred. In that letter the defendant takes two objections to its liability: First, that the proof of loss was too late, and that it should have been made within thirty days after loss; and second, that the claim was fraudulent. Distinctly taking the ground that the condition as to the proof of loss had not been complied with.

The taking of another and distinct objection was not a waiver of the first. The entire letter was a distinct intimation that the company would rely upon both the objections stated. Had the defendant omitted to notice the omission to furnish proof of loss within the time prescribed, that time having long elapsed, it is questionable whether it would have been deemed a waiver, for the reason that it was then too late to supply the omission; and the plaintiff would have lost nothing by the omission of the company to call his attention to it. The defendant was at liberty, in response to the claim then made for the first time, by the plaintiff, to take every objection which was open to it. The objections did not annul or destroy or operate as a waiver of each other.

It is difficult to see how a party waives or is estopped from taking an objection which he distinctly asserts and makes at the very first opportunity. There was no evidence of waiver; and it was error for the learned judge to submit the question to the jury. The result was, as may be expected in every like case, the jury sympathizing with the insured, and thinking lightly of conditions which are really of the essence of the contract, and regarding them rather as technicalities than

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matters of substance, have given their verdict against the insurers.

The judgment must be reversed and a new trial granted.

All concur; MILLER, J., not sitting.

Judgment reversed.

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THE PEOPLE OF THE STATE OF NEW YORK, Appellants, v.  
WILLIAM WASSON, impleaded, etc., Respondent.

Under the provisions of the act of 1868 (chap. 520, Laws of 1868), providing for the payment of damages sustained by certain parties in the draining of the Cayuga marshes, an award was made by the canal appraisers to defendant V. who assigned the same to defendant W. This action was brought to set aside the award, on the ground that it was made by fraud and collusion between V. and the appraisers, and also for want of jurisdiction. *Held*, that as by said act the right of appeal to the canal board was given to either party, and as there was no allegation or proof that an appeal was prevented by fraud, collusion, accident or mistake, also as by various statutes ample power was given to the canal board to grant plaintiffs all the relief sought (chap. 368, Laws of 1829; chap. 201, Laws of 1840; chap. 836, Laws of 1866; chap. 579, Laws of 1868), a resort to an independent action was improper.

The complaint also alleged the commencement of proceedings by defendant W. to enforce payment of the award, and asked that he be enjoined from prosecuting such proceedings. *Held*, that as any defence, legal or equitable, going to the validity of the award, could have been set up by return to the writ, and as there was no allegation or proof that plaintiffs' rights could not be fully protected in the mandamus proceedings, those proceedings could not be enjoined by suit.

(Argued January 31, 1876; decided February 8, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, reversing a judgment in favor of plaintiffs, entered upon the report of a referee, and directing judgment for defendants (plaintiff having waived the right to a new trial).

This action was brought to set aside an award made by the canal appraisers in favor of defendant Voorhees, on the ground

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| 64  | 167 |
| 121 | 643 |
| 64  | 167 |
| 121 | 480 |

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of fraud and collusion, and also that as to some of the items the appraisers had no jurisdiction. The complaint also alleged that proceedings had been commenced by defendant Wasson, who claimed the said award by assignment from Voorhees to procure the issuing of a writ of peremptory mandamus to compel the payment of said award, and asked that the prosecuting of such proceedings be enjoined.

The referee found the making of the award by the canal appraisers under the act chapter 520, Laws of 1868, but negatived the allegations of fraud. He also found that no sufficient notice of the hearing before the appraisers was given to the commissioner in charge, also that no appeal was taken by either party to the canal board. Upon the ground of the want of notice he held that the award should be set aside, and that the fact that the canal commissioner did not appeal did not preclude plaintiffs from maintaining the action and he thereupon directed judgment vacating the award and enjoining the mandamus proceedings.

*E. W. Paige* for the appellants. The award was void. (*Rogers v. Bradshaw*, 20 J. R., 735, 744; *Elmendorf v. Harris*, 23 Wend., 628; *Sharp v. Johnson*, 4 Hill, 92, 98; *Owners of Ground v. Mayor of Albany*, 15 Wend., 374; *Jordan v. Hyatt*, 3 Barb., 275, 282, 283; *Butler v. Mayor of N. Y.*, 1 id., 325; 7 Hill, 329; *Borrowe v. Milbank*, 3 Abb. Pr., 28.) The award being void this action would lie. (2 Story's Eq. Jur., §§ 1450, 1452: *Butler v. Mayor of N. Y.*, 7 Hill, 329; *Dobson v. Pearce*, 2 Kern., 164; *Cleland v. Hidly*, 5 R. I., 163; *Skipworth v. Skipworth*, 9 Beav., 135; Watson on Arbitration and Award, chap. 9, p. 3202; *Sumpter v. Lipe*, Dickens, 497.)

*Eugene Burlingame* for the respondent. The canal appraisers had jurisdiction of the subject-matter of the claim under chapter 520, Laws of 1868. (*People ex rel. Jermain v. Thayer*, 63 N. Y., 348; *Danforth v. Snyder*, 4 Comst., 66.) The fact that the amended claim was not filed within



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one year after the passage of the act of 1868, could not, under the facts of the case, affect the validity of the award. (*Hardman v. Bowen*, 39 N. Y., 196; *Dawson v. People*, 25 id., 399; *Barnes v. Badger*, 41 Barb., 99; *People v. Cook*, 14 id., 259; *Thomas v. Clapp*, 20 id., 167; *People v. Allen*, 6 Wend., 486; *People v. Halley*, 12 id., 481; *Ex parte Heath*, 3 Hill, 43; *Stryker v. Kelly*, 7 id., 9; *Marchant v. Langworthy*, 6 id., 646; *Gale v. Mead*, 2 Den., 160; *Pond v. Negus*, 3 Mass., 230; *Jackson v. Young*, 5 Cow., 259; *In re M. and H. R. R. Co.*, 19 Wend., 143; 1 Kent's Com., 465; *Rex v. Loxdale*, 1 Burr., 447; *Johnson v. A. and S. R. R. Co.*, 54 N. Y., 417; *Waltmire v. Westover*, 14 id., 16; *Morey v. Farmers' Loan Co.*, id., 302; *Arthurton v. Dalley*, 20 How., 311.) The State having recognized the validity of the award and waived all objection to the filing of the amended claim, is estopped from maintaining this action. (*Hartwell v. Root*, 19 J. R., 345; *Jackson v. Shafer*, 11 id., 517; 3 East, 192; 10 id., 216; 1 Greenl. Ev., § 40; *People v. Carpenter*, 24 N. Y., 86; *Leland v. Cameron*, 31 id., 115; *Jackson v. Cole*, 4 Cow., 587; *Tompkins v. Lee*, 59 N. Y., 662; *Hubbard v. Hubbard*, 61 Ill., 228; 3 R. S. [5th ed.], 866, § 13; *U. S. v. Barker*, 4 Wash. C. C. R., 464; 12 Wheat., 559; *Bk. of U. S. v. U. S.*, 24 How. [U. S.], 711; *U. S. v. Bk. of Metropolis*, 15 Pet., 377; *U. S. v. Wilder*, 3 Sum., 308; *Darnington v. Bk. of Alabama*, 13 How. [U. S.], 12; *Brisco v. Bk. of Comm. of Ky.*, 11 Pet., 257; *People v. Phœnix Bk.*, 4 Bos., 363; *People v. Canal Bd.*, 55 N. Y., 395; *Creath v. Sims*, 5 How. [U. S.], 192; *People v. Stephens*, 52 N. Y., 306; *Barnes v. Badger*, 41 Barb., 98; *Lee v. Tillotson*, 24 Wend., 337; *Root v. Wagner*, 30 N. Y., 9, 17, 153; *Buel v. Trustees, etc.*, 3 id., 197; *Embury v. Conner*, id., 511; *Baker v. Braman*, 6 Hill, 47.) The State not having appealed to the canal board this action cannot be maintained. (Laws 1868, chaps. 520, 579; Laws 1829, chap. 368, § 3; Laws 1866, chap. 836; Laws 1840, chap. 201; 1 Greenl. Ev., § 40; *Le Guen v. Gouveneur*, 1 J. Cas., 439, 492; *Foster v. Wood*, 6 id., 87; *Dobson v. Pearce*, 12 N. Y.,

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156-165; Wil. Eq. Jur. [Potter's ed.], 160, 161; 2 Abb. New Dig., 770; *Norton v. Wood*, 5 Paige, 249; *Foster v. Millner*, 50 Barb., 386; *Tappen v. Heath*, 1 Paige, 293; *Schræppell v. Shaw*, 3 N. Y., 446; *Vilas v. Jones*, 1 id., 274; *Stillwell v. Carpenter*, 59 id., 414; *Dudley v. Mayhew*, 3 id., 9-16; *Alney v. Harris*, 5 J. R., 175; *Edwards v. Davis*, 16 id., 281; *People v. Carrington*, 2 Wend., 287; *Church v. Suprs. Alleg. Co.*, 15 id., 197; *In re Mt. Morris Square*, 2 Hill, 27; *People ex rel. S. and U. H. R. R. Co. v. Betts*, 55 N. Y., 600; *N. Y. C. R. R. Co. v. Marvin*, 11 id. 276; *McAllister v. Albion Plk. R. Co.*, 10 id., 353.)

*Per Curiam.* The plaintiffs seek to have the award declared void, on account of fraud and want of jurisdiction in the appraisers; and they also ask to restrain its enforcement, alleging that Wasson had made a motion in the Supreme Court at Special Term for a peremptory mandamus to compel the auditor to pay it, which was pending and undecided at the commencement of this action.

We think there are two answers to this action: 1. The statute (Laws of 1868, chap. 520), under which jurisdiction was conferred upon the appraisers to hear and decide these claims, gives to either party the right to appeal to the canal board, as in other cases. There is no allegation or proof that the appeal was prevented by fraud, collusion, accident or mistake. The canal board had ample power, by various statutes, to grant plaintiffs all the relief they could obtain in this action. (Laws of 1829, chap. 368; Laws of 1840, chap. 201; Laws of 1866, chap. 836; Laws of 1868, chap. 579.) Having this easy and simple remedy provided by law for all the grievances of which they complain, plaintiffs should not have resorted to an independent action. 2. Wasson had commenced proceedings to enforce payment of the award by mandamus. In those proceedings the auditor, on behalf of the State could have set up, in his return to the writ, any defence, legal or equitable, which the State had, going to the validity of the award. There are no allegations in the com-

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plaint and no proof that plaintiff's right could not be perfectly protected in those proceedings, and they should not, therefore, be enjoined by a suit in equity.

Judgment affirmed, with costs.

All concur.

Judgment affirmed.

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JOHN HEERMANS, Trustee, etc., Appellant, v. GEORGE C. CLARKSON, impleaded, etc., Respondent.

A receiver authorized to execute upon payment formal satisfaction and discharge of mortgages in his hands as such officer, has authority to receive payment of the amount secured by and to satisfy a mortgage, although the same be not due at the time.

A subsequent ratification by the mortgagor of a payment made by a third person without his previous request is equivalent to an original authority to make the payment.

(Argued January 27, 1876; decided February 8, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department affirming a judgment in favor of defendants, entered upon a decision of the court at Special Term.

This action was brought by plaintiff as trustee of the estate of Joseph Fellows to set aside a satisfaction and discharge of a bond and mortgage, and to foreclose said mortgage.

The bond and mortgage in question were executed by defendants Clarkson and wife to said Joseph Fellows, who thereafter by trust deed conveyed his property, real and personal, to plaintiff, including said bond and mortgage. In an action brought by Fellows to set aside the trust deed, defendant Bostwick was appointed receiver. By a supplemental order he was authorized "to execute and acknowledge for record formal satisfaction and discharge of all real estate mortgages which came to him as such receiver, upon payment to and collection by

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him thereof, or of debts the payment of which they are given to secure." While this order was in force, one Hill paid to said receiver the amount unpaid on said mortgage, a portion of which was not then due, and the receiver executed and delivered to Hill a discharge of the mortgage, and also delivered to him the mortgage. The receiver paid the money over to Fellows. The suit brought by Fellows resulted in favor of plaintiff. Subsequently Clarkson paid to Hill the amount the latter had paid, received the bond, mortgage and discharge, and put the latter on record.

*A. Hadden* for the appellant. The receiver exceeded his powers in collecting and receiving money not due on the mortgage, and his acts in collecting it were void. (*Deavenport v. Dickinson*, 21 How., 297; *Verplanck v. Mer. Ins. Co.*, 2 Paige, 452; *Fellows v. Heermans*, 4 Lans., 230; *Sheridan v. House*, 4 Keyes, 588; *In re pet. Livingston*, 34 N. Y., 567.) The payment to the receiver was not a satisfaction of the mortgage. (*Harris v. Fox*, 8 Alb. L. J., 301; *Harbeck v. Vanderbilt*, 20 N. Y., 395.)

*Sherman S. Rogers* for the respondent. The receiver had authority to collect any sums unpaid on the mortgages which came into his hands, whether due or not. (*Olcott v. Heermans*, 3 Hun, 43.) Hill, in making the payment, acted as the respondent's agent, and the ratification of it relates back and affirms and authorizes the act of payment. (Story on Agency, § 239; *Coml. Bk. v. Warren*, 15 N. Y., 580.)

*Per Curiam*. The authority given to the receiver by the supplementary order of June 2, 1870, was broad enough to authorize him to receive the money unpaid on mortgages held by him as receiver, whether due or not, at the time of the payment. By that order he was authorized and empowered "to execute and acknowledge for record formal satisfaction and discharge of all real estate mortgages which came to him as receiver, upon payment to or collection by him

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thereof, or of debts the payment of which they are given to secure.”

The mortgage executed by Clarkson was, as is found by the court upon evidence sufficient to authorize the finding, paid to the receiver by Hill, while this order was in force; and this payment, although made without the previous request of the mortgagor, was afterward ratified by him, which was equivalent to an original authority to make the payment. (Story on Agency, § 239; *Coml. Bk. v. Warren*, 15 N. Y., 580.) This view disposes of the case, and it is unnecessary to consider the other questions discussed on the argument.

The judgment should be affirmed..

All concur.

Judgment affirmed.

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ALFRED H. WILES et al., Respondents, v. LAMBERT SUYDAM,  
Appellant.

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| 64  | 173 |
| 119 | 403 |
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| 131 | 492 |
| 64  | 173 |
| 147 | 609 |

Where a complaint contains, in one count, two causes of action, which cannot be properly united in the same action, the omission to state them in separate counts does not deprive defendant of his right to demur.

A complaint setting forth facts sufficient and seeking to charge defendant, as a stockholder of a manufacturing corporation, organized under the general laws (chap. 40, Laws of 1848), with a debt of the corporation, because of a failure to make and record the certificate required by said act (§ 10), and also alleging the requisite facts, and seeking to charge him, as trustee, with the debt, because of failure to file an annual report (§ 12), contains two separate and distinct causes of action which cannot properly be united.

The first cause of action is one upon contract, the second is an action upon a statute for a penalty or forfeiture.

The two causes of action do not arise out of the same transaction or transactions connected with the same subject of action, within the meaning of section 167 of the Code.

*Wiles v. Suydam* (3 Hun, 604; S. C., 6 T. & C., 292) reversed.

(Argued January 28, 1876; decided February 8, 1876.)

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Statement of case.

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APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, affirming a judgment of Special Term in favor of plaintiffs, entered upon an order overruling a demurrer to plaintiff's complaint. (Reported below, 3 Hun, 604; 6 T. & C., 292.)

The complaint in this action alleged, in substance, the incorporation of the "Imperishable Stone Block Pavement Company," under the general manufacturing act (chap. 40, Laws of 1848); that said corporation became indebted to plaintiffs for work, labor and materials, and that judgments were obtained against it in actions upon such indebtedness, upon which judgments executions were issued and returned unsatisfied; that defendant, at the times the said debts were contracted, was a stockholder of the company, holding \$50,000 of its stock; that no certificate stating the amount of the capital stock paid in was ever made or recorded, and that defendant had not paid in the amount of capital stock held by him; also, that at the times said debts were contracted defendant was a trustee of the company; that said company did not, within twenty days after January 1, 1873, make, nor has it since made and published the annual report required by section 12 of said act.

Defendant demurred on the ground, among others, that two causes of action were improperly united.

*A. H. Hitchcock* for the appellant. The complaint alleged two separate and distinct causes of action. (2 R. S. [5th ed.], 660, § 10; *Corning v. McCullough*, 1 N. Y., 47, 76; *Story v. Furman*, 25 id., 214, 220; *Conant v. Van Schaick*, 24 Barb., 87; *Abbott v. Aspinwall*, 26 id., 202, 207; *Rochester v. Barnes*, id., 657, 554; *Allen v. Sewell*, 2 Wend., 367; *Moss v. Oakley*, 2 Hill, 265, 269; *Bailey v. Banker*, 3 id., 188; *Harper v. McCullough*, 2 Den., 119; *Mer. Bk. v. Bliss*, 35 N. Y., 112; *Warren v. Doolittle*, 5 Cow., 678.) These two causes of action could not be united. (3 R. S. [5th ed.], 784, § 1; Code, §§ 167, 471; Code 1852, p. 183; 1 Chit.

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Pleadings, 229 ; 6 Paige, 137 ; V. S. Pleadings, 35-183 ; 2 Wait's Pr., 362, 292.)

*Geo. W. Weiant* for the respondents. The first ground of demurrer was not available. (50 N. Y., 176 ; 2 R. S. [5th ed.], 660, 661, §§ 32, 35.) If the complaint set forth two causes of action, they were properly joined. (2 R. S. [5th ed.], 660, 661, §§ 32, 35 ; 1 Hun, 332.) The complaint set forth but one cause of action. (10 Abb. Pr., 445 ; 9 How. Pr., 83 ; 13 id., 228 ; 19 id., 94.) The fourth ground of demurrer was of no avail. There was no defect of parties. (Code, § 144.) The allegations of the complaint were amply sufficient. (Code, § 145 ; 4 How., 98 ; 5 id., 112 ; 6 id., 255 ; 7 id., 278 ; 13 Abb., 443, 457 ; 1 Seld., 163 ; 11 Barb., 443 ; 53 N. Y., 648 ; 37 id., 648.)

CHURCH, Ch. J. The ground of demurrer relied upon is that several causes of action are improperly united. The complaint contains but one count composed of a series of allegations, and was doubtless framed upon the theory that there is but one cause of action contained. If, however, the complaint does contain several causes of action, and they are improperly united, the omission to state the causes of action in separate counts properly numbered does not deprive the defendant of the right to demur. (*Goldberg v. Utley*, 60 N. Y., 427.) The complaint alleges an indebtedness against the Imperishable Stone Block Pavement Company of New York city, which had been prosecuted to judgment and execution ; that the defendant was a "stockholder to the amount of \$50,000," but had not paid for the same, and that no certificate had been made and recorded that the capital was paid in. Section 10 of the act authorizing the formation of corporations for manufacturing and other purposes declares that until such certificate is recorded the stockholders shall be liable for the debts of the company to the amount of their stock respectively. The complaint also alleges that at the time the debt was contracted and ever

since, the defendant was a trustee of the corporation, and that no report was filed on the 1st day of January, 1873, nor at any time since, and for this neglect the twelfth section of the act aforesaid declares that the trustees shall be liable for all the debts of the corporation then existing, or which may be thereafter created, until such report is filed.

It is insisted by the counsel for the plaintiff that this constitutes but one cause of action, and he argues that the cause of action is to recover the debt upon two grounds of personal liability created by statute. I am unable to concur in this view. The recovery of the debt is the object of the action, but a cause of action must have two factors, the right of the plaintiff and the wrong or obligation of the defendant. These must concur to give a cause of action. The cause of action against the defendant as a stockholder, consists of the debt and the liability created by statute against stockholders when the stock has not been paid in and a certificate of that fact recorded. In effect the statute in such a case withdraws the protection of the corporation from the stockholders, and regards them liable to the extent of the amount of their stock as copartners. (*Corning v. McCullough*, 1 N. Y., 47.) The allegations in the complaint are sufficient to establish a perfect cause of action against the defendant as a stockholder primarily liable for the debts to the amount of his stock. The allegations against the defendant as trustee also constitute a distinct and perfect cause of action, but of an entirely different character. Here the liability is created by statute and is in the nature of a penalty imposed for neglect of duty in not filing a report showing the situation of the company. The object of the action is the same, viz., the collection of the debt; but the liability and the grounds of it are entirely distinct and unlike. That there are two causes of action in this complaint seems too clear to require much argument. The more difficult question is, whether they may be united in the same complaint. The first cause of action against the defendant as a stockholder is an action on contract. The six years' statute of limitations



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applies. (1 N. Y., *supra*.) The defendant is entitled to contribution. (3 Hill, 188.) But in respect to the action against defendant as trustee, this court held in *Merchants' Bank v. Bliss* (35 N. Y., 412), that the three years' statute of limitations applied under the following provision of the Code: "An action upon a statute for a penalty or forfeiture when the action is given to the party aggrieved." (§ 92.)

With this decision before us, which we do not feel at liberty to overrule, this cause of action must be regarded as an action *upon a statute for a penalty or forfeiture*. The liability is far more extensive than that of stockholder, it is for all debts, while the former is limited to the amount of the stock. The defendant would not be entitled to contribution except by statute (Laws of 1871, p. 1435), and contributions would be from different persons than in the other case. It is claimed also that execution against the person might issue and this would seem to follow from the decision in 12 New York (*supra*), but we do not deem it necessary to pass upon that question. If these actions may be united it must be by virtue of the first subdivision of section 167 of the Code. From the nature of the two actions they do not come under either of the other subdivisions. The first subdivision reads as follows: "The plaintiff may unite in the same complaint several causes of action whether they be such as have been heretofore denominated legal or equitable, or both, when they all arise out of: 1st. The same transaction or transactions connected with the same subject of action." This language is very general and very indefinite. I have examined the various authorities upon this clause, and I am satisfied that it is impracticable to lay down a general rule which will serve as an accurate guide for future cases. It is safer for courts to pass upon the question as each case is presented. To invent a rule for determining what the "same transaction" means, and when a cause of action shall be deemed to "arise out" of it, and what the "same subject of action" means, and when transactions are to be deemed connected with it, has taxed the ingenuity of many learned judges, and I do not deem it

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necessary to make the effort to find a solution to these questions. An interesting chapter on this clause is contained in a recent work by John N. Pomeroy, on "Remedies and Remedial Rights" (p. 496), which contains a review of all the authorities, and a critical analysis of the language with definitions and suggestions which will be useful in determining particular cases. Judge COMSTOCK says of this clause: "Its language is I think well chosen for the purpose intended, because it is so obscure and so general as to justify the interpretation which shall be found most convenient and best calculated to promote the ends of justice." (17 N. Y., 592.) There is certainly ample scope for construction, but it is sometimes difficult to determine what interpretation will best promote the ends of justice. It is probable that the primary purpose of this provision was intended to apply to equitable actions, which frequently embrace many complicated acts and transactions relating to the subject-matter of the action, which it would be desirable to settle in a single controversy. The clause was not intended to overturn all distinctions in actions and rules of pleadings, and this court has held that an action of trespass, in breaking into a house and opening a trunk, could not be joined with an action on a covenant in a lease for quiet enjoyment, although the act which rendered the defendant liable in both actions was the same. (56 N. Y., 332.) In this case it is attempted to unite an action on a statute for a penalty with an action on contract. The nature of the two actions are essentially different, although the object to be attained is the same. The facts to establish the liability are entirely unlike. The measure of liability is different; the defenses are different. The rights of the defendant may be seriously prejudiced. Suppose a general verdict is obtained, from whom would the defendant seek contribution, from his co-trustees or from his co-stockholders? Can it be said that these causes of action arose out of the same transaction? If so, what was the transaction? Was it the formation of the company? That created no liability nor cause of action. Was it the debt of the plaintiff? That

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created no liability against the trustees, nor does such liability arise out of it. Was it the failure to file a certificate that the stock was not paid in? If so, there is no connection between that and the transaction which created the liability against the defendant as trustee. An omission to record a certificate that the stock was paid is not, in any sense, the same transaction as the neglect of trustees to file a report of the financial condition of the company. Without attempting to define the terms of the last clause, I do not think that there is any such connection between the transactions, out of which the causes of action arose in this case, and the "subject of action" as to justify uniting the two causes of action.

The causes of action are independent of each other; the "transactions" are different, and there is no legal affinity between them. The language of the last clause is more applicable to equitable actions where the controversy is in respect to specific property, real or personal. It is difficult to define in this case the "subject of action." The object of the action is to recover the debt; but is the debt the subject of action? In some sense it, perhaps, may be so regarded, while in another the subject of action may be regarded the penalty or forfeiture. If the former, there is no natural connection between it and the transaction creating the liability. If the latter, it has no connection with the transaction against defendant as a stockholder. The language of the last clause, it seems to me, has no application to this case, and I am confident it was never intended by it to force a connection between such distinct and independent things. It may be convenient for the plaintiff to combine the two causes of action, but, looking at the rights of both parties and the rules of law, we cannot think that the Code was designed to authorize their union in one complaint.

The judgment must be reversed, and the demurrer sustained, with leave to the plaintiff to amend within the usual time.

All concur.

Judgment accordingly.

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Statement of case.

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EDWIN L. JONES et al., Appellants, v. ELBERT C. SMITH,  
Respondent.

In an action of ejectment wherein the question was as to the location of a boundary line, it appeared that the adjoining owners for more than fifty years had occupied each on his side up to an old fence; that the fence had been kept up and maintained as a division fence for more than twenty years, each owner by agreement keeping up one-half. *Held*, that this was sufficient evidence of a practical location of and an acquiescence in the fence as the boundary line, and of a possession for more than twenty years in pursuance of such location to require the submission of that question to the jury.

*Jones v. Smith* (3 Hun, 351) reversed; the principles, however, there stated in head-note not disturbed.

(Argued January 19, 1876; decided February 8, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department affirming a judgment in favor of defendant, entered upon an order nonsuiting plaintiff, on trial at circuit. (Reported below, 3 Hun, 351; 5 T. & C., 490.)

This action was ejectment, brought originally by David H. Jones, to recover a strip of land claimed by each party (they being adjoining owners) to belong to his farm. The question was simply as to the location of the boundary line. The original plaintiff having died after judgment, the present plaintiffs, his heirs at law and administrators, were substituted. The facts sufficiently appear in the opinion.

*R. L. Hand* for the appellants. Plaintiffs were entitled to recover the land in question. (*Baldwin v. Brown*, 16 N. Y., 359; *Reed v. Farr*, 35 id., 113; *Hunt v. Johnson*, 19 id., 220; *Robinson v. Phillips*, 1 T. & C., 151; *Pierson v. Mosher*, 30 Barb., 81; *Ratcliffe v. Gray*, 3 Keyes, 510; 3 Tr. Apps., 117.) The words "ought to be established," in the deed of plaintiff's intestate, are not an admission that the fence was not on the line. (30 Barb., 81; *Champ., etc., R. R. Co. v. Valentine*, 19 id., 484; *Jewell v. Harrington*, id., 471; *Sparrow v. Kingman*, 1 Comst., 242; *Stuyvesant v. Dunham*,

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9 J. R., 61; *Jackson v. Wood*, 13 id., 346; *Jackson v. Dysling*, 2 Cai., 197; *Hubbell v. McCulloch*, 47 Barb., 288; *Baldwin v. Brown*, 16 N. Y., 359; *Reed v. Farr*, 35 id., 113; 1 T. & C., 151.) The survey and all testimony relating to fences, other than those of the premises in question, were improperly admitted. (16 N. Y., 359; 35 id., 113; 30 Barb., 81.) The testimony of Boynton as to his statement to Van Ornum was erroneously admitted. (*Jackson v. Mc Vey*, 15 J. R., 235; 9 id., 61; 11 id., 569; *Drew v. Scott*, 46 N. Y., 204.) It was error to receive in evidence the deeds under which defendant claimed. (*Crary v. Goodman*, 22 N. Y., 175; *Sherry v. Frecking*, 5 Duer, 452.)

*Robt. S. Hale* for the respondent. Plaintiffs were bound to establish what was equivalent to an adverse possession in them for twenty years. (*Baldwin v. Brown*, 16 N. Y., 359; *Terry v. Chandler*, id., 354, 358; *Drew v. Swift*, 46 id., 204, 209; *Corning v. Troy I. and N. Factory*, 44 id., 577, 595, 596; *Clark v. Baird*, 5 Seld., 183, 204; *Clark v. Withey*, 19 Wend., 320; *Adams v. Rockwell*, 16 id., 285.) The declarations of defendant's grantor as to his conversation with plaintiffs' grantor while in possession and ownership of plaintiffs' farm were properly admitted. (*Morse v. Salisbury*, 48 N. Y., 636, 642; *Pitts v. Wilder*, 1 id., 525; *Gibney v. Marchay*, 34 id., 301; *Moore v. Hamilton*, 44 id., 666.)

RAPALLO, J. The old fence which the appellants claim to be the easterly boundary of their farm, was erected in the year 1812 by one George Throop, who was then in possession of the farm. This farm was known as the "Cross-lot." Throop cultivated the land up to this fence. The evidence shows that he erected the fence for the purpose of protecting a crop of wheat which he had planted upon the land now in controversy; and that from the time of the erection of the fence, in 1812, up to the time of the entry by the defendant, in 1866, this land continued in the actual possession of Throop and his grantees as part of the "Cross-lot" farm.

In the year 1820 the fee of this farm was conveyed to

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Throop by one Hunt, by a deed which described it as then being in the possession of George Throop, and proceeded to give the boundaries. The easterly boundary was therein stated to be "the east line of the Montessor patent as the same ought to be established."

The original plaintiff in this action, Dudley H. Jones, derived title to the Cross-lot farm, from Throop, by sundry mesne conveyances, containing, as the case states, the same description.

The evidence shows an uninterrupted occupation by Dudley H. Jones and his grantors, of the Cross-lot farm, embracing within its inclosure the strip of land now in dispute, for a period of more than fifty years before the entry by the defendant. This entry took place in the year 1866, when the defendant tore down the old fence, or portions of it, and erected a new fence to the westward of it, on what he claims to be the true east line of the Montessor patent — thus cutting off from the easterly side of plaintiffs' farm the strip of land in controversy, which is from ten to twenty rods wide, and throwing this strip into his own farm. His paper title makes the east line of the Montessor patent the westerly boundary of his farm. Dudley H. Jones, the original plaintiff, thereupon brought this action of ejectment to recover the strip of land in question. He having died the present plaintiffs have been substituted.

It is clear that the possession of Dudley H. Jones and his grantors, prior to the entry by the defendant, was sufficient *prima facie* proof of title to entitle Jones or his heirs to recover in this action, unless the defendant showed a better title. This he endeavored to do by proving that the old fence was not upon the true easterly line of the Montessor patent, but that such true line was westerly of the fence, and that the premises in controversy, from which he had ejected the plaintiff, were easterly of that line, and consequently ought to have been included in the defendant's farm.

In answer to this claim the plaintiffs contend that the division line between their farm and that of the defendant

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had been established by practical location, and that the old fence which had stood since 1812, must be regarded as such division line, whether located upon the true line of the patent or not.

The court below dismissed the plaintiffs' complaint, and the dismissal was sustained at General Term, on the ground that the deeds under which the plaintiff derived title declared the easterly line of his farm to be the easterly line of the Montessor patent as the same "ought to be established;" that this was an admission that the line was not then established, and, by implication, that the fence was not on the true line. It was also held that the oral proof in respect to occupation and acts of acquiescence in the location of the fence was overcome by proof that the fence was maintained for convenience merely, and was not recognized by the respective owners as the line between their farms.

We are of opinion that the court below erred in thus disposing of the case. There was evidence of acquiescence in the fence as a boundary line which we think should have been submitted to the jury. It appeared, in the first place, that for upwards of fifty years the adjoining owners had each occupied the land up to the old fence; that in 1844 one Luke Van Ornum was the owner of the Cross-lot farm and lived on it, and one Boynton owned the adjoining farm on the east now owned by the defendant; that by agreement between Boynton and Van Ornum each kept up one-half of this fence. As expressed in the testimony, they divided the fence between them, one agreed to keep up the north half and the other the south half, and they maintained it under that agreement. Van Ornum occupied up to the fence on his side and Boynton did on his side. Van Ornum conveyed to Dudley H. Jones in 1845, but remained in possession under him after the conveyance. He was in possession some seven years, and testifies that while he was in possession he kept the south part of the fence in repair and Boynton the north. There was no change in the occupation of the land until the defendant entered in 1866.



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We think that these acts were competent evidence, upon which the jury might have found a practical location of the boundary line between the two farms, and a possession of more than twenty years in pursuance of such location. But the effect of these acts was sought to be destroyed by the evidence of Boynton, who testified to a conversation with Van Ornum, while the latter owned the Cross-lot, in which conversation Boynton stated to Van Ornum that Throop had said that the fence was not on the line; that he was not prepared to make a line fence, but that when they did they would make it on the line; and he, Boynton, said he claimed to the patent line.

On the trial, before Boynton was called as a witness, Van Ornum was interrogated as to conversations with him, and, in substance, denied that Boynton had ever claimed that the fence was not on the line. Boynton having been afterwards called, and having testified to a particular conversation with Van Ornum respecting the question whether the fence was a division fence, Van Ornum was then recalled by the plaintiffs, who offered to disprove by him the alleged conversation between him and Boynton, testified to by the latter, and to contradict Boynton in that regard. The defendant objected, on the ground that Van Ornum had already been fully examined. The objection was sustained, and exception taken.

In making this ruling the learned court must have assumed that the conversation testified to by Boynton had been in substance denied by Van Ornum, otherwise it was error to refuse to permit the plaintiff to examine him in respect to it. In the absence of any qualification of the acts of the parties in mutually maintaining the fence between them, such as was shown by the alleged conversation between Boynton and Van Ornum, the jury would have been authorized to infer from their acts that they had agreed to the fence being the division line between their farms. The qualification of these acts by the alleged conversation, if controverted, became a question of fact for the jury. The plaintiff expressly requested the court to submit to the jury the question of



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Statement of case.

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acquiescence in the line as claimed by the plaintiff. He also requested the court to charge the jury that if they believed the respective owners had acquiesced in and maintained the old fence as the line between them for twenty years before the removal of the same by the defendant, that was evidence that the old fence was on the boundary line between the parties, and on their so finding they could find for the plaintiff. Both of these requests were refused, and exceptions taken separately to the refusals. In both refusals we think the court erred.

The judgment must, therefore, be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

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THE CAYUGA LAKE RAILROAD COMPANY, Respondent, v.  
GEORGE A. KYLE, Appellant.

Defendant subscribed to plaintiff's articles of association, which were duly acknowledged and filed. The company was organized under them, elected officers, constructed and put in operation its road and the company was recognized by the legislature. (Chap. 814, Laws of 1869.) Defendant paid in ten per cent of the stock subscribed for by him; calls were made for the balance which he declined to pay. In an action to recover the amount unpaid, *held*, it was no defence that said articles were defective in not definitely stating the termini of the road or the counties through which it passed, as, notwithstanding the defect, the shares of stock to which his subscription entitled him were shares in a corporation *de facto*.

(Submitted January 17, 1876; decided February 8, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, affirming a judgment in favor of plaintiff entered on a decision of the court at Special Term.

The nature of the action and the facts are set forth sufficiently in the opinion.

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Opinion of the Court, per RAPALLO, J.

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*W. E. Hughitt* for the appellant. No recovery can be had because the preliminary articles filed were not in compliance with the statute. (32 Ind., 169, 194; 43 id., 265; *People v. Van Valkenburgh*, 63 Barb., 105-109; 58 N. Y., 400; 20 id., 159; 24 Barb., 395; 32 id., 625; 16 Wend., 605; 1 Sandf. Ch., 179; 1 Cai. Cas., 94; 31 Barb., 258; 25 N. Y., 208; *Grand Trunk v. Cook*, 29 Ill., 237; *Ind. R. R. Co. v. Chance*, 32 Ind., 472; 57 N. Y., 473.) Defendant is not estopped from raising this objection. (Herman on Estoppel, 532, § 571; 62 Barb., 497; 1 Cai. Cas., 94; 16 Wend., 605; 1 Sandf. Ch., 179; 42 N. Y., 443; 43 id., 283; 57 id., 473; 58 id., 397; 32 Barb., 616.)

*Jas. R. Cox* for the respondent. Defendant being an original subscriber to plaintiff's stock could not question the regularity of its incorporation. (*Dutchess Mfg. Co. v. Davis*, 14 J. R., 238; *Palmer v. Lawrence*, 3 Sandf., 176; *Plk. R. Co. v. Rust*, 5 How. Pr., 390; *Nav. Co. v. Weed*, 17 Barb., 378; *F. Ins. Co. v. Horner*, 17 Ohio, 407; *White v. Coventry*, 29 Barb., 305; 15 Abb., 66; *Eaton v. Aspinwall*, 19 N. Y., 119; *Buff. R. R. Co. v. Carey*, 26 id., 75; *Mead v. Keeler*, 24 Barb., 20; *Erie v. Owen*, 32 id., 316; *Hyatt v. Whipple*, 37 id., 595, 601; *White v. Syracuse*, 14 id., 559; *Lake O. R. R. Co. v. Mason*, 16 N. Y., 451; *Buffalo v. Dudley*, 14 id., 336; *Eaton v. Aspinwall*, 19 id., 121; *Ogdensburgh v. Frost*, 21 Barb., 541.) Chapter 314, Laws of 1869, remedied all defects in the articles filed. (14 N. Y., 336; 15 Abb., 66; 29 Barb., 305; *Black River R. R. Co. v. Barnard*, 31 id., 258.)

RAPALLO, J. This action is brought to recover from the defendant a balance remaining unpaid upon a subscription made by him in June, 1867, for ten shares, of \$100 each, of the capital stock of the plaintiff.

The defendant signed the original articles of association, in which the then proposed railroad was described as intended to be constructed from "the New York Central Railroad to

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Ithaca, the length of said railroad to be thirty-seven miles.” The articles were duly acknowledged and filed, the company was, in fact, organized under them, officers elected, and the railroad constructed and put in operation, and calls made upon the subscribers for payment of their subscriptions; and the corporate existence of the company was recognized by the legislature by an act passed April 24, 1869. (Laws of 1869, chap. 314.)

The defence set up by the defendant is, that the articles of association were defective in not distinctly stating the termini of the road, nor the counties through which it passed.

The defendant's subscription entitled him to the shares for which he had subscribed; and by the acts of his associates in going on and locating and constructing the road, and putting it in operation, and by the legislative recognition of its corporate existence, by the act of April 24, 1869, these shares became shares in a corporation *de facto*, notwithstanding the defect in the original articles. Through his act, and that of his associates, in entering into the articles of association, this corporation was formed, and has assumed to exercise the franchises and functions of a regularly constituted railroad company under the act of 1850 (chap. 140), and it has received legislative recognition as such. It appears to have obtained sufficient credit to build its road and set it in operation. The defendant has received all that he contracted for, and no good reason is shown why he should be relieved from the obligation of paying for his shares. The case of *The Buffalo and Allegany Railroad Company* (26 N. Y., 75) is, we think, decisive of all the questions raised by the appellant.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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Statement of case.

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FRANCIS B. WALLACE, Appellant, v. DAVID SWINTON,  
Respondent.

A plaintiff in ejectment must recover upon the strength of his own title; he can take nothing by reason of any defects in that of the defendant. An execution against real property, issued after the death of the judgment debtor, is absolutely void as against those having in their hands any portion of the real estate of the deceased affected by the judgment, who have not been made parties to proceedings authorized by the law to revive the judgment against said estate.

It is essential to the validity of such an execution that its issuing be authorized by judgment in proceedings, under section 376 of the Code, for the enforcement of the judgment.

It is not optional with the judgment creditor to proceed under that section or under section 284; the latter is only applicable where there has been a delay for five years in issuing execution, and the judgment debtor is still living.

Said section 376 is not repealed or affected by the act of 1850 (chap. 295, Laws of 1850), making the leave of the surrogate necessary to the issuing of an execution after death of the judgment debtor; this is simply an additional requirement.

*Flannigan v. Irwin* (53 Barb., 587), *Wilgus v. Bloodgood* (33 How., 289) overruled as far as this question is concerned.

As to whether heirs, devisees or terre-tenants can avail themselves of irregularities in proceedings before the surrogate to defeat a title to real property acquired under a sale by virtue of an execution authorized to be issued by the surrogate, *quære*.

(Argued February 1, 1876; decided February 15, 1876.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, affirming an order of Special Term, which set aside a verdict for plaintiff and granted a new trial.

This was an action of ejectment, brought to recover possession of certain premises situate in the town of Deer Park, Orange county. The plaintiff claimed title by virtue of a sale under two executions, issued upon judgments against one Samuel Fowler. After the rendering of the judgments, and before the executions were issued, Fowler

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died, in 1864, seized of the lands in question. After his death, his heirs took possession, and remained in possession until the entry of defendant. In 1868, the plaintiff, then being the owner of the judgments, presented a petition to the surrogate of Orange county asking leave to issue executions thereon; such proceedings were thereupon had that in June, 1868, the surrogate granted leave. No execution had been previously issued upon said judgments, and more than five years had elapsed since the rendering of the judgments. Plaintiff, also, in June, 1868, presented a petition to the Supreme Court for leave to issue executions, setting forth, among other things, that the judgment debtor died seized of real estate, subject to the liens of the judgments. An order to show cause was granted, which directed service thereof to be made on the widow and heirs at law of the deceased, who were named, the deceased having died intestate.

The order was served on the persons named, and upon various others, occupants of portions of the premises. On return of the said order, an order was made by the Special Term, by default, granting the leave sought. A motion was subsequently, and after executions had been issued, made on behalf of the widow to open the default and set aside the order, upon which it was referred to a referee to take testimony and find the facts, the same not to interfere with proceedings upon the executions. The referee reported the two judgments to be wholly unpaid. The case does not show any further proceedings thereon. No guardian *ad litem* for the infant heirs was appointed in the proceedings, either in the Surrogate's Court or in the Supreme Court. The premises in question were sold under the execution, and bid off by plaintiff who, after expiration of the time for redemption, received the sheriff's deed therefor. Defendant was then in possession. He entered into possession under a contract with one Birdsall, who agreed to procure from the sheriff a certificate of sale of the premises and to assign it to defendant. Further facts appear in the opinion.

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*Stephen W. Fullerton* for the appellant. Defendant can not raise any question as to the regularity of these proceedings. (*People v. Norton*, 9 N. Y., 176; *In re Livingston*, 34 id., 555-570; *Casler v. Shipman*, 35 id., 533; *Campbell v. Erie R. Co.*, 46 Barb., 319; *Van Etten v. Currier*, 3 Keyes, 329; *City Bk. of N. H. v. Perkins*, 29 N. Y., 554; *Brown v. Perkins*, 36 id., 473.) If it was irregular to proceed without the appointment of a guardian for the infant heirs at law, the proceedings are thereby rendered voidable merely, not void. (*Croghan v. Livingston*, 17 N. Y., 218; *Rogers v. McLean*, 34 id., 536; Bacon's Abr., Infancy and Age, 1, 2-6; *Whittingham's Case*, 8 Coke, 43; *Austin v. Charlestown Fem. Sem.*, 8 Metc., 196; *Van Bramer v. Cooper*, 2 J. R., 278; *Clemens v. Clemens*, 37 N. Y., 59; *Boylan v. McAvoy*, 29 How., 278; *Jackson v. Todd*, 6 J. R., 257; *Bool v. Mix*, 17 Wend., 119.) Plaintiff having acquired the rights of the infants, is entitled to judgment of ejectment against defendant. (*Jackson v. Hazen*, 2 J. R., 22; *Jackson v. Harder*, 4 id., 202; *Smith v. Lorillard*, 10 id., 338.) The surrogate and the Supreme Court having jurisdiction of the proceedings and to make the order that the executions issue, those orders cannot be attacked or impeached in this action. (C. & H. Notes, 946, note 692; *Jackson ex dem. Jenkins v. Robinson*, 4 Wend., 437; *Van Wormer v. Mayor, etc.*, 15 id., 263; *Wilder v. Case*, 16 id., 583; *Monell v. Dennison*, 17 How., 422; *White v. Merritt*, 3 Seld., 352; *Porter v. Purdy*, 29 N. Y., 106; 1 Clinton's Dig. [ed. 1866], 1112.) The appointment of a guardian *ad litem* for the infant defendants was not necessary. (Code, § 115; *Fairchild v. Durand*, 8 Abb., 305; *Croghan v. Livingston*, 17 N. Y., 218; *Rogers v. McLean*, 34 id., 536; *Lefever v. Laraway*, 22 Barb., 175; 2 Story's Eq. Jur., §§ 1334-1347.) The order of the surrogate was regular and authorized the issuing of the executions. (Laws of 1850, chap. 295; *Alden v. Clark*, 11 How., 209; *Wilgus v. Bloodgood*, 33 id., 289; *Flanagan v. Tinin*, 37 id., 130; *In re Hopper Mott*, 1 Tuck., 344; 3 R. S. [5th ed.], 158; 3

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id., 154, 362; *Van Dusen v. Sweet*, 51 N. Y., 385.) Permission of the Supreme Court was properly and regularly obtained before the executions were issued. (Code, §§ 283, 284; 1 Tuck., 344; 11 How., 209-214.)

*C. H. Winfield* for the respondent. In ejectment the plaintiff must recover, if at all, on the strength of his own title, not on the weakness of that of the defendant. (*Hill v. Draper*, 10 Barb., 454; *Richardson v. Pulver*, 63 id., 67; *Smith v. Lorillard*, 10 J. R., 339, 346; *Lane v. Raymond*, 2 S. & R., 64; *Covert v. Traver*, 3 id., 283; *Lessee of Walter v. Coulter*, Add., 390; Tyler on Ejectment, 72, 105, 204, 560, 852; *Brady v. Henion*, 8 Bosw., 528; *Foster v. Evans*, 51 Mo., 39; *Sullivan v. Dimmitt*, 34 Tex., 114; *Hutchinson v. Perley*, 4 Cal., 33; *Bloom v. Burchick*, 1 Hill, 130; *Schauber v. Jackson*, 2 Wend., 13; *Harrison v. McIntosh*, 1 J. R., 379; *Hunter v. Trustees, etc.*, 6 Hill, 407; *Fulton v. Hallow*, 20 Cal., 450; *Love v. Hill*, 3 Harr. [Del.], 530; *Shumway v. Phillips*, 22 Penn., 135; *Townsend v. Wesson*, 4 Duer, 342; *Jackson ex dem. Sleight v. Hasbrouck*, 12 J. R., 213; *Jackson ex dem. Antell v. Brown*, 3 id., 459.) Leave to issue the executions was not properly obtained. (2 Stat. at Large, 75, § 23, subd. 3; *Sheldon v. Wright*, 6 N. Y., 497, 511; *Dakin v. Hudson*, 6 Cow., 221; *People v. Koeber*, 7 Hill, 39; 1 id., 39; *Mahoney v. Gunter*, 10 Abb., 431; *Corwin v. Merritt*, 3 Barb., 341; *Burnstead v. Read*, 31 id., 661; *People v. Koeber*, 7 Hill, 39; *Miller v. Brinkerhoff*, 4 Den., 118; *Marine Bk. of Chicago v. Van Brunt*, 49 N. Y., 160; *In re Bentley*, 16 Abb., 89; 2 Stat. at L., 104, 634; Dayton on Surr., 586; *Ackley v. Dygert*, 33 Barb., 176; *Lefever v. Laraway*, 22 id., 167.) Plaintiff should have proceeded by action to revive the judgments against the heirs of Fowler. (*Campbell v. Rawdon*, 18 N. Y., 421, 422; *Jackson v. Schaffer*, 11 J. R., 513; *Morton v. Croghan*, 20 id., 106; *Ireland v. Litchfield*, 22 How., 178, 180; Code, § 284; 4 Stat. at Large, 634; *Frink v. Morrison*, 13 Abb., 80, 83; *Cameron v. Young*, 6 How., 372.)

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ALLEN, J. The plaintiff must recover upon the strength of his own title, and can take nothing by reason of any defects in that of the defendant. It may be assumed for all the purposes of this appeal that the questions sought to be made in respect to the regularity and validity of the proceedings before the surrogate, and of his order granting leave to issue execution are not open to the defendant, but can only be raised and taken by the personal representatives of the judgment debtor over whom the surrogate had jurisdiction. The question in the *Marine Bank of Chicago v. Van Brunt* (49 N. Y., 160) arose upon a motion made by the administratrix of the deceased debtor to set aside an execution for irregularity. The moving party as the personal representative of the deceased judgment debtor properly made the application. The question as to the regularity of the proceedings before the surrogate, as well as the necessity of an application to the Supreme Court for leave to issue the execution were involved in that appeal and considered by the court. It does not follow, however, from the judgment in that case that heirs or terre-tenants could avail themselves of the irregularities there complained of to defeat a title to real property acquired under a sale by virtue of the execution, and we do not consider it necessary to pass upon the question at this time. The important question and that which goes to the foundation of the plaintiff's right of recovery is, whether the execution under which he acquired title was void for the reason that it was issued several years after the death of the judgment debtor without proceedings against the heirs, devisees or terre-tenants of the property affected by the judgment, and without giving them a day in court to show cause why the judgment should not be enforced against the estate of the judgment debtor in their hands.

If the execution was merely irregular and therefore only voidable, proceedings under it are valid, and the title of the plaintiff cannot be impeached collaterally, or so long as the proceedings remain unreversed and unvacated. The remedy of the party affected by the irregularity would be by direct



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application to set aside the execution. (*Jackson v. Robins*, 16 J. R., 537.) But an execution against real property issued after the death of the judgment debtor is absolutely void as against those who are not made parties to proceedings authorized by law for the revival of the judgment against their property, and making them parties to the judgment.

Before the Code of Procedure the process was by writ of *scire facias quare executionem non*, and an execution issued against lands and tenements without a revivor by such process was void as to all who were not made parties to the proceedings. (*Woodcock v. Bennet*, 1 Cow., 711; *Stymets v. Brooks*, 10 Wend., 207; *Campbell v. Rawdon*, 18 N. Y., 412; *Dyer*, 76, b; Bacon's Abr., Ex., G. 2; Com. Dig., Ex. F.) In *Jackson v. Robins* (*supra*), the claimant had been personally summoned upon the *scire facias* as heir, while she claimed as devisee, and the court held that sufficient to give jurisdiction. The reasons given for the necessity of a *scire facias* are that a new party is affected by the execution, and that these new parties should have a day in court to show cause, if any, against the application of their property to the discharge of the judgment.

The Code in simplifying the procedure in civil actions merely changed the form of the remedy. It abolished the writ of *scire facias* and gave two distinct and different remedies as substitutes; the one applicable in cases where there has been a delay in the issuing of execution for five years and the judgment debtor is still living, and the other, cases where the judgment debtor has died after judgment; and the proceedings in the one case are not applicable to and cannot be adopted in the other. It is not optional with the judgment creditor whether he proceed under section 284 or section 376 of the Code. If the debtor is alive he must proceed under the former; if dead, under the latter. If an execution issues against a living judgment debtor after the statutory limitation as to time, and without previous application to the court, it is simply irregular and voidable, but not absolutely void: there is a party living who can take measures to avoid the

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proceeding. Not so, however, where the judgment debtor is dead and the execution issues against real property in the hands of strangers to the judgment, there is in such case no party living to take advantage of the irregularity. By section 284 application is made for leave to issue execution upon notice to the adverse party, *i. e.*, the judgment debtor, over whom the court has jurisdiction in the action. In the case of a deceased judgment debtor there is no adverse party to whom notice may be given; therefore provision is made by section 376 for making the new parties in interest parties to the record and proceedings, by a process proper in form to give the court jurisdiction over them. The statute prescribing the procedure for the issuing of an execution against real property affected by the judgment after the death of the judgment debtor, necessarily by implication excludes every other process and proceeding to accomplish the same purpose, within the maxim *expressio unius est exclusio alterius*. These two provisions of the Code have never been repealed in terms or modified in any way; they are still in full force, each governing in cases to which it is applicable.

The claim is, however, that section 376 of the Code and the subsequent sections prescribing the detail of the procedure in the case provided for, have been superseded by chapter 295 of the Laws of 1850. It is well settled that repeals by implication are not favored in the law, and that, unless the two statutes are entirely repugnant, both may stand. The act of 1850 can have full effect without interfering at all with the provisions of the Code alluded to. It may perchance shorten the limitation of time within which the execution may be issued against the real property of the judgment debtor after his death, and simplify the form of the execution in such cases, but whether it accomplishes either of these purposes it is not necessary now to decide. It does make the leave of the surrogate necessary in all cases to the issuing of an execution after the death of a judgment debtor; this was the prominent object of the act, and the legislature may well have thought it important with a view to the

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settlement of estates, the marshalling of assets and the prevention of an unnecessary resort to proceedings against heirs and terre-tenants, in respect of real property held by them and affected by the judgment, when, by a proper application of the personal effects, the judgment could be paid. But the leave of the surrogate was not repugnant to or inconsistent with the proceedings authorized by the Code in the court having jurisdiction of the judgment. There is no evidence any where in the act of an intent, on the part of the legislature, to deprive heirs and terre-tenants of the substantial right to a hearing before their property could be taken upon process to which they were not parties. With the exception of two cases, *Flannigan v. Tinen* (53 Barb., 587) and *Wilgus v. Bloodgood* (33 How., 289), the decisions are uniform; that the act of 1850 has not superseded the provisions of the Code regulating the procedure in the court in which a judgment is recovered, for enforcing the same after the death of the debtor, and the cases before referred to cannot be regarded as authority, so far as they intimate a different opinion. (*Alden v. Clark*, 11 How., 209; *Frink v. Morrison*, 13 Abb. Pr. R., 80; *The Marine Bank of Chicago, supra*; *Wood v. Morehouse*, 45 N. Y., 368; *Docks v. Backenstose*, 12 Wend., 542.)

There were no proceedings in the Supreme Court, pursuant to section 376 of the Code, for the revival of the judgment against the heirs, devisees or terre-tenants of the lands of the deceased judgment debtor, nor were the parties in interest summoned to show cause why the judgment should not be enforced against the estate of the judgment debtor in their hands respectively; nor were they made parties to the judgment or proceeding by any process authorized by statute or recognized by the practice of the court. It does not appear by the proceedings that any person appeared to contest the application for leave to issue execution, except the widow of the deceased judgment debtor, and it does not appear that she claimed to be or was either heir, devisee or tenant of any lands affected by the judgment. The court acquired no

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jurisdiction against the parties to be affected by the execution, by reason of their interest in the lands and estate of the judgment debtor, by the summary proceedings and orders spread out upon the record. They were a nullity as against the parties interested or in possession of the real estate of the judgment debtor. It follows that the execution upon the judgment was void as against the real estate sought to be reached by it. The plaintiff acquired no title under the sale, and should have been nonsuited.

The order granting a new trial must be affirmed, and judgment absolute for the defendant pursuant to stipulation.

All concur.

Order affirmed, and judgment accordingly.

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MARY HARRIS, Appellant, v. THE EQUITABLE LIFE ASSURANCE  
SOCIETY OF THE UNITED STATES, Respondent.

In an action upon a policy of life insurance defendant set up as a defence and proved that after the policy had been forfeited by reason of non-payment of premiums defendant was induced by false representations on the part of plaintiff (the assured) as to the health of the insured to receive the back premiums and to revive the policy. The insured died within a week thereafter. Defendant served an offer to allow judgment for the back premiums so received with interest and costs. The court directed a verdict for plaintiff on the ground that it was the duty of defendant, on discovery of the fraud, to have returned, or offered to return, the back premiums and to disaffirm the new contract; and not having done so the fraud was no defence. *Held*, error; that conceding the rule stated to be applicable to the case, it was substantially complied with by the offer of judgment; that defendant was not bound to make the offer before a claim was presented; and as the action was brought soon after the time allowed by the policy for the payment of the claim had elapsed, that the offer was made with sufficient and reasonable promptness; also that it was no answer that the offer not having been accepted within the time prescribed was to be deemed withdrawn, as the non-acceptance was the fault of the plaintiff.

(Argued February 2, 1876; decided February 15, 1876.)

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APPEAL from order of the General Term of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon a verdict. (Reported below, 3 Hun, 724 ; 6 T. & C., 108.)

This action was upon a policy of life insurance issued by defendant upon the life of plaintiff's wife for \$3,000, payable to plaintiff.

The policy contained a clause forfeiting it in case of non-payment of premiums at or before the time specified therein. The amount insured was to be paid in sixty days after proof of death. The premiums were to be paid quarterly.

On March 28, 1870, at which time three quarterly payments were past due and unpaid, plaintiff applied to defendant for leave to pay the back premiums and to have the policy restored. This defendant consented to do upon plaintiff's signing a written statement that the insured was equally as well as when examined for the policy, and that she had not been sick since that time. The insured was at that time, and had been for some weeks, very ill and she died about a week thereafter. Defendant set up the fraud as a defence and served an offer to allow judgment for the amount of back premiums so received, with interest and costs. The court directed a judgment for the plaintiff, holding that it was the duty of the company, at the time of the discovery of the fraud, to have returned, or offered to return, the premiums and to disaffirm the new contract; and not having done so it had made out no defence, to which defendant duly excepted.

*A. R. Dyett* for the appellant. It was no error for the judge to direct a verdict for plaintiff. (*Hutcheons v. Johnson*, 43 Barb., 392; 32 id., 171, 176; *Wheaton v. Baker*, 14 id., 594; *McNevin v. Livingston*, 17 J. R., 437; *Bruce v. Davenport*, 3 Keyes, 474; 12 N. Y., 18, 23; 18 id., 558; 5 Abb. Pr. [N. S.], 420.) The rule that a party desiring to rescind a contract for fraud must act promptly on its discovery and restore what he has received, does not apply where the fraud is set up as a defence to an action on the contract. (5 Abb.

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[N. S.], 185-191; 10 Barb., 406, 429, 430; 26 N. Y., 224, 232; 56 id., 673, 674; 48 id., 365, 373; 49 id., 623-626; 3 Seld., 220, 226; 3 E. D. S., 203, 205; 3 Lans., 196; 1 Daly, 209, 211, 212; affirmed, 41 N. Y., 620; 3 Wend., 236; 3 Keyes, 474; 41 Barb., 420; 46 id., 467; 53 N. Y., 637; Parsons' Mer. Law, 57; Chitty on Con. [11th Am. ed.], 1092, notes *y* and *z*.) A contract may be rescinded for fraud, but until rescinded is in force. (5 Hill, 389; 39 N. Y., 211, 215; 5 Barb., 319, 322; 13 id., 641, 645; 3 E. D. S., 269, 272; 1 Den., 69; 2 id., 136; 32 Barb., 171; 35 id., 76; 11 How. Pr., 526; 29 N. Y., 358; 46 id., 533; 24 Wend., 74.)

*George De Forest Lord* for the respondent. A party claiming to rescind a contract must bring the action as plaintiff. (*Ash v. Putnam*, 1 Hill, 302; *Voorhees v. Earl*, 2 id., 288; *Masson v. Bovet*, 1 Den., 69; *Baker v. Robbins*, 2 id., 136; *Matteawan Co. v. Bentley*, 13 Barb., 641; *Wheaton v. Baker*, 14 id., 594; *Willis v. Bradley*, 1 Sandf., 560; *Ladd v. Moore*, 3 id., 589; *Nichols v. Michaels*, 23 N. Y., 364; *Hinney v. Kiernan*, 49 id., 164; *Cobb v. Hatfield*, 46 id., 533; *Faschierris v. Henriques*, 36 Barb., 276; *Pearse v. Pettis*, 47 id., 267.) Defendant was bound to offer to restore what it had received before it could take affirmative action. (*Nellis v. Bradley*, 1 Sandf., 560; *Ladd v. Moore*, 3 id., 589; *Nichols v. Michaels*, 23 N. Y., 264; *Allerton v. Allerton*, 50 id., 670; 36 Barb., 276; *Hawkins v. Appleby*, 3 Sandf., 421; *Anderson v. Sherwood*, 56 Barb., 66.)

MILLER, J. It must be conceded that a fraud was committed by the plaintiff upon the defendant, by representations made as to the health of the assured at the time when the back premiums were paid and accepted; and the policy which had been forfeited, by reason of a failure to pay the premiums as they became due, was sought to be restored to its former condition. A single question, therefore, arises upon this appeal, and that is, whether the judge erred in holding that the defendant was bound, upon the discovery of the fraud, to return the premiums and to disaffirm the new contract,

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and never having done so, it did not offer any defence to the plaintiff's claim; and in directing a verdict for the plaintiff.

There is no doubt of the correctness of the general rule that where a party seeks to disaffirm a contract upon the ground of fraud he is bound to act promptly upon the discovery of the fraud, and to return, or offer to return, all that he has received under the contract. Rescission on the ground of fraud, failure of consideration, and kindred reasons, is a right in equity; and hence, where the return of the money or property can be made, and equity is thereby done, no good reason exists why the rule stated is not fully complied with. In other words, a man shall not keep what he has obtained under a fraudulent contract, and then claim that it shall be rescinded without any return. The rule referred to is, most generally, applied in actions to recover property, or for a wrong, as to recover the price of goods sold and delivered, or for money paid fraudulently when the plaintiff seeks redress, and hence, ordinarily, has no just and equitable claim until he has restored, or offered to restore, the property or money which he has received. Such actions generally relate to contracts of sales between vendor and vendee, as those already referred to, and not to actions of the character of the one at bar.

Without considering whether the rule referred to precludes a party from setting up the fraud as a defence when money received has not been returned, or an offer made to that effect, and conceding the correctness of the rule as applicable to this case, we are of the opinion that the rule was substantially complied with by the offer made to allow the plaintiff to take judgment for the amount of the premiums paid and entered thereon. The defendant was not bound to make the offer before the claim was presented, and had sixty days from that time to pay the amount. The action was brought soon afterwards, and if the offer had been accepted, would have restored all the parties to their former condition, and done equity between them. The time within which, after the death



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Opinion of the Court, per MILLER, J.

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of Mrs. Harris, the offer was made was reasonable and sufficiently prompt, and this was all which could be required. In *Allerton v. Allerton* (50 N. Y., 670) this court held that the rule that he who seeks to rescind an agreement upon the ground of fraud must place the other party in as good a condition as that in which he was when the agreement was made, is satisfied if the judgment asked for will accomplish that result, and in such case no offer to return that which was received is necessary. It is true, in the case cited, the plaintiff had brought the action claiming that there was fraud, and that the contract was void; but the principle is equally applicable where the defendant asserts that the contract was fraudulent and void.

After stating the rule, that the party seeking to rescind must place the other party in as good a situation as that in which he was when the agreement was made, in the opinion, it is said, by FOLGER, J., "the law looks to the result, and not the means." It was also remarked that the reason of the rule is, that the party shall not retain the thing which is the subject of the contract, and, on his action, recover the price paid for it, or retain the price paid and, on his action, recover the thing; and that this reason is satisfied when the claim made and the judgment sought by the plaintiff will leave with the defendant all that he parted with, and thus put him in as good plight as at the time of the agreement. The same result would have followed here by a judgment in favor of the plaintiff for the premiums paid. It is no answer to say that the offer not having been accepted within the ten days, it was deemed to be withdrawn, for it was the fault of the plaintiff that he did not accept it, and thus obtain restoration of the money which he had paid.

Under the circumstances of this case, as justice has been done, and the result has been attained which the law contemplates, the order of the General Term should be affirmed, and judgment absolute ordered for the defendant, with costs.

All concur; CHURCH, Ch. J., ANDREWS and EARL, JJ., concur in result.

Order affirmed and judgment accordingly.



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Statement of case.

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GEORGE SLOANE, Appellant, v. WILLIAM ELMER, Respondent.

In an action to recover damages for an injury resulting from a collision between plaintiff's carriage and one alleged to belong to defendant, through the negligence of the coachman driving the latter, the principal question on the trial was as to whether the carriage belonged to defendant or his daughter, to whom defendant claimed to have sold it and the horses. It was not claimed by defendant that the employment of the coachman was separate from the ownership of the carriage and horses, and the evidence showed them inseparably connected. The court charged that, if defendant did not own the carriage and horses, no recovery could be had. Defendant's counsel requested him to charge that if the jury find the coachman was not the servant of the defendant but of the daughter, they could not find for plaintiff. The court remarked that he did not see how he could separate the two things on the evidence, and said counsel excepted to the refusal to charge as requested. *Held*, that the remark could not be construed as a refusal to charge the request as a legal proposition, but only that as a question of fact; the ownership of the carriage and horses and the employment of the coachman could not be separated, and that the form of the exception did not change the effect of the decision.

*Sloane v. Elmer* (1 Hun, 310) reversed.

(Argued February 2, 1876; decided February 15, 1876.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, reversing a judgment in favor of plaintiff, entered upon a verdict and granting a new trial. (Reported below, 1 Hun, 310.)

The nature of the action and the facts are set forth sufficiently in the opinion.

A. R. Dyett for the appellant. The court properly refused to charge as requested. (10 N. Y., 489, 499; 11 id., 679; 43 id., 216; 2 Abb. Ot. App. Dec., 480.) In finding the verdict for plaintiff, the jury necessarily found that the carriage and horses belonged to him, and so necessarily found defendant guilty of willful falsehood, and the maxim "*falsus in uno, falsus in omnibus*" applies. (29 N. Y., 471, 492; id., 523, 528-531; 40 id., 1, 2-44; id., 172; 1 Hun, 307; 4

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Opinion of the Court, per CHURCH, Ch. J.

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Barb., 571, 587; 55 id., 293, 296-297.) No error was committed which called for a reversal of the judgment. (14 Barb., 259, 303, 310, 376; 6 id., 436; 3 Hill, 287-288; 7 Wend., 160; 35 Barb., 651-652; 15 N. Y., 409, 413; 16 id., 407, 412, 413; 47 id., 286; 13 Barb., 510, 521; 34 id., 358, 360-361.) The General Term erred in granting a new trial. (13 Barb., 520; 2 id., 216; 16 id., 386, 391; 2 Comst., 193.)

*Amasa J. Parker*, for the respondent. It was not error for the General Term to grant a new trial. (*Quarman v. Burnet*, 6 M. & W., 449, 509, 510; *Hughes v. Boyer*, 9 Watts, 556; *Weyiant v. N. Y. and H. R. R. Co.*, 3 Duer, 360; Story on Agency [7th ed.], §§ 453 *a*, 453 *b*.)

CHURCH, Ch. J. This action was brought to recover damages for an injury to plaintiff's wife, by a collision between the carriage of the plaintiff and that of the defendant, alleged to have been caused by the negligence of the coachman driving the latter. The principal contest on the trial was whether the establishment which it was alleged produced the collision belonged to the defendant or to his daughter, Mrs. Hunt. It was conceded that the defendant had owned the carriage and horses and employed the coachman, but it was claimed that sometime previous to the accident he had sold the horses and carriage to his son, and that the latter had sold them to the daughter, Mrs. Hunt.

At the close of the charge, the case states that, "defendant's counsel requests the court to charge: 'if they find this coachman was not the servant of the defendant but was in the employ of Mrs. Hunt, they cannot find for the plaintiff,'" and that the court remarked that he did not see how he could separate the two things on the evidence in the case. The defendant's counsel excepted to the refusal of the court to charge as requested. The proposition of law contained in the request was undoubtedly correct; and if the true construction of what took place is that the judge refused to charge it as a legal proposition, or if the jury were misled

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Opinion of the Court, per CHURCH, Ch. J.

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in respect to it the General Term was clearly right in reversing the judgment. But is that the proper construction? All the evidence on the trial connected the ownership of the carriage and horses with the employment of the coachman. There was no claim on the part of the defendant, or Mrs. Hunt, or any of the witnesses, that the employment of the coachman was separate from the ownership of the carriage and horses; and it was assumed that the two things went together. True, the defendant testified generally that he sold the carriage and horses, and discharged the coachman; and Mrs. Hunt testified that she owned the former and employed the latter. The coachman testified, on his direct examination, that he drove for Mrs. Hunt at the time of the accident; but on his cross-examination he stated that when he was first employed he went to defendant's house and saw Mrs. Hunt, and she told him to come around in the evening and see her father; that he went around, and then said that he did not know who did hire him, but that Mrs. Hunt always paid him, and that no other arrangement was ever made with him. This was previous to the alleged sale of the horses and carriage; and there is no dispute but that this hiring of the coachman was by or for the defendant; and there is no evidence that there was any other or different employment. Mrs. Hunt resided with the defendant and was in the habit of paying the servants and other bills for him. The sale of the carriage and horses was claimed to be colorable, and that the establishment was used in the family the same as before; and the evidence was principally directed to that question, the employment of the coachman being regarded as an incident to the ownership of the carriage and horses. The judge charged the jury that if the defendant did not own the carriage and horses no recovery could be had; and the case was submitted on that question, assuming as the parties had assumed throughout the trial, that the employment of the coachman depended upon the decision of that question.

When the judge remarked that he could not see how the

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 Statement of case.
 

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two things could be separated, did he intend to say, as matter of law, that the request was not correct, or only that under the evidence, as a question of fact, the ownership of the carriage and horses and the employment of the coachman could not be separated? It seems to me that this was all he intended to say. A verdict that the defendant owned the carriage and horses and that the driver was in the employ of Mrs. Hunt, would be contrary to the theory of both parties and inconsistent with all the evidence in the case. Nor do I think that the jury could have been misled. If the judge had formally assented to the proposition, he would have been fully justified in stating that the question depended upon the ownership of the carriage and horses, and that the two things were inseparably connected by the evidence. The jury must have so understood the remark made. The exception to the refusal of the judge to charge as requested cannot change the effect of the decision intended to be made. The jury must have found by their verdict that the carriage and horses belonged to the defendant, and this necessarily involved the employment of the coachman.

The order of the General Term must be reversed and judgment entered on verdict affirmed, with costs.

All concur; except FOLGER, J., not sitting.

Order reversed and judgment accordingly.

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FOSTER MORSS, Appellant, v. ROMAN H. GLEASON et al.,  
Respondents.

One who purchases the interest of a partner in a firm acquires simply a right to an accounting in respect to the partnership effects and to a share of the surplus remaining after payment of the partnership debts, deducting any balance that may be due from the vendor to his copartners upon an accounting.

Where a member of a firm transfers his interest therein to a third person, who is received into the firm as a partner in his stead, he thereafter occupies the position simply of surety for the firm debts to the extent

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Statement of case.

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that the assets of the firm are sufficient for their payment. Such assets are held by the new firm, charged with a trust for the payment of the debts of the old firm.

M., R. and G. were partners. G., with the consent of his copartners, sold out his interest to B., who assumed all the liabilities of G. as a partner, and was received into the firm in his stead. The wife of G. at the time held a note made by the firm. M. & R. subsequently acquired the interest of B. At the time of these transfers the firm property was sufficient to pay all its debts. G. procured the note, then past due, and transferred it to M. in payment of a debt due to M. individually. M. transferred the note to plaintiff. In an action upon the note, *held*, that M., upon acquiring title to the note *eo instanti*, acquired a right to a credit as between him and his partner for its amount as so much paid upon a partnership debt; that he could not have maintained an action against G., either upon the note or for a contribution, at least until he had first exhausted the partnership assets and shown a deficiency; and that as plaintiff took it subject to all the equities existing against it in the hands of M., he could not recover.

(Argued February 3, 1876; decided February 15, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of defendant Gleason, entered upon the report of a referee. (Reported below, 2 Hun, 31.)

This action was brought upon a promissory note made by the firm of Morss, Reed & Co., of which firm defendants were the partners.

The note was dated January 2, 1865. On the 25th January, 1867, defendant Gleason (who alone appeared and answered), with the assent of his copartners, sold and assigned his interest in the firm to one Baker, who assumed his liabilities and was received into the firm in the place of Gleason. At this time the wife of Gleason owned and held the note in suit. Baker's interest in the firm assets was subsequently sold to defendant Burton G. Morss. At the time of the transfers the firm assets were more than sufficient to pay the debts. Gleason procured the note and transferred it to Morss as so much payment upon a contract for the purchase by him from Morss of certain real estate, and the amount was indorsed upon the agreement. In July, 1870, and long

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Statement of case.

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after the maturity of the note, Morss assigned it to plaintiff.

*Amasa J. Parker* for the appellant. The property of the old firm passed into the hands of the new firm, stripped of all equitable liability for the payment of debts outstanding, as far as Gleason is concerned. (*Sage v. Chollar*, 21 Barb., 598; *Story on Part.*, §§ 97, 326, 858, 859; *Ex parte Ruffin*, 6 Ves., 119.) The transfer of the note to Gleason was not and did not operate as a payment of it, nor did the transfer of the note to Morss operate as a payment or extinguishment of it. (*Smith v. Lasher*, 5 Cow., 688; *Sherwood v. Barton*, 36 Barb., 284.) A retiring partner is still liable for the debts of the firm, though he retire with the consent of the other members of the firm. (*Pars. on Part.*, 424, 437 [2d ed.]) Whether the taking of the note by Morss was a payment or purchase depended entirely on his intent. (*Pars on Cont.*, 142, note *i*; *Russell v. Austin*, 1 Paige, 192; *Champney v. Coope*, 32 N. Y., 543, 549; *Bascom v. Smith*, 34 id., 320; *Bealer v. Mayer*, 19 C. B. [N. S.], 76.)

*J. I. Werner* for the respondents. The interest Gleason sold to Baker was confined to his interest in the surplus property and effects of the firm after payment in full of all its existing debts and liabilities. (*Menagh v. Whitwell*, 52 N. Y., 146; *Story on Part.*, § 97, and notes.) The balance of Gleason's interest not sold to Baker remained in the hands of his late associates as a fund pledged to the payment and satisfaction of his proportion of the old firm debts and liabilities, and Morss and Reed had an exclusive lien upon this fund for the purposes of such payment and satisfaction. (3 *Kent's Com.*, 65, 80; *Story on Part.*, §§ 326, 441; 52 N. Y., 146; *Adams' Doctrine of Eq.* [ed. of 1873], 243, 483, note 2.) Morss and Reed were clothed with a trust to apply such joint property to the payment and satisfaction of the joint debts and liabilities. (52 N. Y., 169; *Story on Part.*, § 360.)

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Opinion of the Court, per ALLEN, J.

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ALLEN, J. By the transfer from Gleason to Baker of his interest in the property and assets of the firm of Morss, Reed & Co., Baker only acquired a right to an accounting, in respect to the partnership effects, and to the surplus that should remain after the payment of the partnership debts, and any balance that might be due from Gleason to his copartners upon an accounting between them. By such transfer, the partnership of Morss, Reed & Co., as that firm had been theretofore constituted, was dissolved, and by the acceptance, by the remaining partners, of Baker, as a member of the firm, a new partnership was created, in which Baker was substituted for Gleason, the retiring partner. From that time the partnership property and effects were held by the new firm, charged with a trust for the payment of the firm debts, including that for which this action is brought; and the retiring partner, Gleason, occupied the position of a surety for the debts existing against the firm, of which he had been a member, to the extent that the assets of the firm were sufficient for their payment and discharge. As the referee has found upon sufficient evidence that the personal effects of the firm were more than sufficient to pay all its debts, not only at the time of the transfer from Gleason to Baker, but also at the subsequent time when the remaining partners Morss and Reed acquired the interest of Baker therein, it follows that, as between Gleason and his former partners Morss and Reed, Gleason was a surety only in respect of all the debts of the firm of which he had been a member, and that the assets of the firm were primarily liable for their payment, and that he could have compelled their application to that purpose, and Morss and Reed could not have compelled a contribution from him for the payment of any of such debts without showing that the partnership assets had been applied to their payment and were exhausted. This result follows, necessarily, from the principles adjudged by this court in *Menagh v. Whitwell* (52 N. Y., 146), in which case the rules governing the rights and liabilities of partners, as between each other, upon the

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Opinion of the Court, per ALLEN, J.

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transfer by one of his interest in the partnership effects, and the consequent dissolution of the copartnership, were considered, and an elaborate discussion of those principles, and a review of the authorities, would be out of place at this time. The general doctrine is recognized by elementary writers, and is well settled by authority. (*Savage v. Putnam*, 32 N. Y., 501; *Story on Partnership*, §§ 97, 360; 3 Kent's Com., 65; *Marquand v. N. Y. Mfg. Co.*, 17 J. R., 525.) When therefore, Gleason, in payment of his debts to Morss, procured the transfer to his former partner Morss, of the note in suit, upon which all were liable as partners *in solido* to the holder of the note, but in respect of which Gleason was, as between himself and Morss and Reed, the other makers, *quasi* surety, and for the payment of which Morss and Reed were the trustees of an ample fund, Morss *eo instanti* acquired and was entitled to a credit as between himself and his partner, the owners of the trust property, subject only to the charges upon it for the amount of the note as so much paid by him; and to this extent his interest in the trust fund was increased. He could not have maintained an action against Gleason in any form, either upon the note or for a contribution as for so much money paid by him upon a partnership debt; but to entitle him to any relief as against Gleason he would have been compelled first to exhaust the partnership assets and show a deficiency. He, in fact, was not out of pocket at any time by reason of the transaction, and had no claim, legal or equitable, against Gleason. The note was long past due at the time of its transfer to the plaintiff, and the latter took it subject to all defenses and to all equities existing against it in the hands of Morss, the member of the firm from whom he received it. This is the rule applicable to all negotiable instruments transferred after due or when dishonored.

In order to maintain his action at law the plaintiff was, under the circumstances, bound to show all that his transferer, Burton G. Morss, would have been compelled to show in an equitable action against Gleason for contribution.



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Statement of case.

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The referee rightly held that the plaintiff did not acquire by the transfer from Burton G. Morss a right of action upon the note against Gleason, and that the complaint should be dismissed.

Judgment must be affirmed.

All concur; except MILLER, J., not sitting.

Judgment affirmed.

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HENRY W. LANCEY, Appellant, v. JOSIAH G. CLARK,  
Respondent.

Defendant made his promissory note for the accommodation of the firm of Lambert & Lincoln, who procured it to be discounted and the proceeds were passed to their credit. Before the note matured Lincoln wrote to plaintiff to take up the note and to furnish money for that purpose. Plaintiff sent the money to Lincoln who placed it in bank to his individual credit, and on the day the note fell due took up the note with his individual check. He did not assume to act for plaintiff or ask to have the note transferred to any one. He asked to have the note protested so that he could hold the indorser and maker after protest. He sent the note to plaintiff. In an action upon the note, *held*, that plaintiff did not take title from the bank but from Lincoln, and subject to any defence against it in the hands of the latter; that the bank could not be made a seller without its knowledge or consent and did not transfer the note but only took payment, and that plaintiff could not recover.

(Argued February 4, 1876; decided February 15, 1876.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of plaintiff entered upon the report of a referee and granting a new trial. (Reported below, 3 Hun, 575.)

This action was brought upon a promissory note made by defendant, payable to the order of Frederick Lambert, who was at the time one of the firm of Lambert & Lincoln. The note was made for the accommodation of said firm and was discounted by the North River Bank and the proceeds passed to the credit of the firm. Soon after the firm was dissolved,

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Statement of case.

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Lincoln agreeing to settle up the firm business. About a week before the note matured Lincoln wrote to the plaintiff, who lived in Canada, asking him to take the note and to send money to take it up; this the plaintiff did. Lincoln deposited the money in the bank to his individual credit and upon the day the note fell due gave his check for the amount thereof. He received the note and directed the clerk to have it protested "to hold the indorser and maker." Nothing was said by him about a purchase or transfer of the note or that he was acting as agent, and plaintiff's name was not mentioned nor the bank informed that the money belonged to plaintiff. The note was protested and then sent by Lincoln to plaintiff. It was not canceled by the bank.

*Thos. H. Hubbard* for the appellant. The note did not lose its negotiability when it matured. (*Leavitt v. Putnam*, 3 N. Y., 494, 498; *St. John v. Roberts*, 31 id., 441, 442.) A delivery by the bank was a sufficient transfer. (2 Pars. on Bills and Notes, 33, 37.) Lancey's money paid for the note and gave him good title to it. (*Van Allen v. Am. Nat. Bk.*, 52 N. Y., 1; *F. and M. Bk. v. King*, 57 Penn. St., 207.) Lancey took the note subject only to defences existing against it in the hands of the bank when it matured. (*Britton v. Hall*, 1 Hilt., 528; *Corbitt v. Miller*, 43 Barb., 305; *Shell v. Tilford*, 4 N. Y. Leg. Obs., 317.) Even if the bank had done nothing showing an intention to keep the note alive as an existing obligation, its payment by Lancey would not necessarily have extinguished it but he might still have maintained his action on it. (2 Pars. on Bills, 216; *Kemp v. Balls*, 28 E. L. and Eq., 498; *Benedict v. De Groot*, 1 Abb. Ct. App. Dec., 125.)

*C. F. Brown* for the respondent. The transaction between Lincoln and the bank at the maturity of the note amounted in law to a payment of it. (*Easton v. Plumer*, 32 N. H., 238; *Lazarus v. Corrie*, 3 Q. B., 459.) Plaintiff was not a *bona fide* holder of the note in suit. (*Pine v. Smith*, 11

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Opinion of the Court, per EARL, J.

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Gray, 38; *Chester v. Dorr*, 41 N. Y., 279; *Bk. of U. S. v. Davis*, 2 Hill, 451; *Small v. Smith*, 1 Den., 583; *Seybel v. Nat. Curr. Bk.*, 54 N. Y., 302.)

EARL, J. The defendant made the note in suit for the benefit and accommodation of the firm of Lambert & Lincoln. It was discounted and the proceeds passed to their credit by the North River Bank. Each member was therefore bound, as to the maker, to pay the note, and thus save him from liability on account thereof. Before the note became due the firm was dissolved, and Lincoln was to close up its business. Plaintiff lived in Canada, and Lincoln wrote him, requesting him to take up the note and furnish the money for that purpose. Plaintiff, a few days before the maturity of the note, sent Lincoln the money, which he placed in the bank to his individual credit. On the day the note fell due he went to the bank, and, by his individual check, paid the note to the discount clerk, who knew at the time that it was an accommodation note. He did not assume to act as agent for any one, and did not ask to have the note transferred to any one, and did not mention plaintiff's name in any way. It is true that he asked to have the note protested so that he could hold the indorser and maker, but he did not disclose why he wanted to hold them. After he had thus paid and taken it, he sent it to the plaintiff. Upon such a state of facts, did plaintiff take his title from the bank or from Lincoln? If he took it from the bank, he took the place of the bank, and his title and right to enforce it were as good as those of the bank at the time he took it. But if he took it from Lincoln it being past due, he took it subject to any defence defendant could have made if sued by Lincoln, and in such case defendant's defence would have been perfect. He could not be successfully sued by either of the persons for whose accommodation he made the note.

Plaintiff did not take title from the bank. It matters not that he furnished the money, and that Lincoln promised to use it in taking up this note for him. It matters not that

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Statement of case.

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the note was protested so that the indorser and maker could be held, or that the bank did not intend absolutely to discharge and cancel the note. The question is, did the bank transfer or sell the note to the plaintiff? To make a sale or transfer takes two parties, one to sell and the other to buy, and the bank could not be made a seller without its knowledge or consent. It was not bound to sell or transfer the note. All it was bound to do was to surrender it upon payment by the person liable to pay it. A seller in such a case incurs some obligation by the sale, although he does not indorse the paper. He impliedly warrants that the paper is genuine and all it purports to be on its face, and he cannot be drawn into this implied warranty without his consent. (*Eastman v. Plumer*, 32 N. H., 238; *Delaware Bank v. Jarvis*, 20 N. Y., 226; *Morrison v. Currie*, 4 Duer, 79; *Aldrich v. Jackson*, 5 R. I., 218; 2 Parsons on Notes and Bills [2d ed.], 37.) All the bank did in this case was to take payment of the note, and deliver it up to a party paying and liable to pay, after protesting it, so that he could make such use of it as the law and the facts would authorize. It did not transfer or intend to transfer it. The plaintiff, therefore, took no title to it from the bank, but he took it from Lincoln, and cannot, therefore, enforce it against the defendant.

The order of the General Term must, therefore, be affirmed, and judgment absolute ordered against the plaintiff, with costs.

All concur.

Order affirmed and judgment accordingly.

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OTTO J. HINTERMISTER, Appellant, v. THE FIRST NATIONAL BANK OF CHITTENANGO, Respondent.

The penalty recoverable from a national bank under the act of congress (U. S. R. S., § 5198), where a greater rate of interest than is allowed by law has been actually paid to and received by it, is twice the amount of the interest paid in excess of the legal rate, not twice the amount of the entire interest.

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Statement of case.

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The forfeiture of the entire interest where more than lawful interest is received or reserved, attaches, and is enforceable only in actions brought to enforce the usurious contract.

The provision is penal in its character, and is to be strictly construed.

The party entitled to maintain the action is entitled to recover twice the amount he has paid for usury within two years prior to the commencement of the action, whether the amount was paid in one or several payments.

*Sturgess v. Spofford* (45 N. Y., 446); *Fisher v. N. Y. C. and H. R. R. R. Co.* (46 id., 644) distinguished.

*It seems*, that as the provision of the act of the legislature of this State of 1870 (chap. 163, Laws of 1870), amending the banking law of the State, was intended to put State banks upon an equality with national banks in respect to interest on loans and the penalties for taking usurious interest, it should receive the same interpretation as the act of congress; and as an interpretation has been given to the act of congress by the United States Supreme Court (*F. and M. N. Bk. v. Deering*, 1 Otto, 29), the same interpretation will be applied to the State law. A debt, therefore, contracted or obligation given for a usurious loan made by a State or national bank is not void, but the forfeiture is limited to the interest.

*The Nat. Bk. of Whitehall v. Lamb* (50 N. Y., 95); *The Farmers' Bk. of F. v. Hale* (59 id., 53) considered as overruled.

*Hintermister v. First Nat. Bk. of C.* (8 Hun, 345; 5 T. & C., 484) modified.

(Argued February 4, 1876; decided February 15, 1876.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department reversing a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term and granting a new trial. (Reported below 3 Hun, 345; 5 T. & C., 484.)

This action was brought under the thirtieth section of the national banking act (U. S. R. S., § 5198) to recover twice the amount of interest paid upon three notes, which were renewals of a former note, and for twice the amount of excess paid upon a fourth renewal. The notes were all made payable with interest. The court found that upon each renewal defendant charged and received twenty dollars in addition to the interest secured by the notes.

The court directed judgment for twice the amount of the entire interest paid upon the three renewal notes and twice the twenty dollars paid in excess upon the last renewal.

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Opinion of the Court, per ALLEN, J.

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*William E. Lansing* for the appellant. Plaintiff was entitled to recover back twice the amount of the interest paid. (Nat. Curr. Act, § 30 ; § 5198 R. S. of U. S. ; 3 R. S. [5th ed.], 72, § 1 ; *Barker v. White*, 3 Keyes, 495 ; *Macoss v. Liverpool, etc., Ins. Co.*, 35 N. Y., 326 ; *Loeshich v. Baldwin*, 38 id., 326.) Section 30 of the national currency act (§ 5198 of the R. S. of the U. S.) is in full force in this State. (*F. and M. Nat. Bk. of Buffalo v. Deering*, U. S. Sup. Ct. ; *Tiffany v. Nat. Bk. State of Missouri*, 18 Wall., 409.)

*D. D. Walrath* for the respondent. This action cannot be maintained. (*Brown v. Second Nat. Bk. of Buffalo*, 72 Penn. St., 209.) Plaintiff could recover only one penalty for all acts committed. (*Sturgess v. Spofford*, 45 N. Y., 446 ; *Fisher v. N. Y. C. and H. R. R. Co.*, 46 id., 644 ; *Footte v. N. Y. C. and H. R. R. Co.*, 50 id., 693.)

ALLEN, J. The Supreme Court of the United States having given an interpretation to the act of congress regulating the interest which may be lawfully taken by national banks, and declaring the penalties for demanding or receiving interest at a greater rate than that allowed by law, adverse to the views of this court, as expressed in *The National Bank of Whitehall v. Lamb* (50 N. Y., 95), neither that case nor that of *The Farmers' Bank of Fayetteville v. Hale* (59 N. Y., 53) can be longer considered as furnishing a rule for decision in cases within the principle of the adjudication by the Federal court. The decisions of that court in all matters of Federal jurisprudence and of the interpretation of the acts of congress, are paramount to and binding upon all other courts.

The judgment in *The Farmers' Bank of Fayetteville v. Hale* was a necessary sequence of that in the case of *Lamb*, the statute of the State being in all respects a transcript of the act of congress, and both received the same interpretation. But by the authoritative decision of the court at Washington, the act of congress receiving a different interpreta-

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Opinion of the Court, per ALLEN, J.

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tion from that which we thought it would bear, it follows, that in order to give effect to the evident intention of the legislature of this State, the statute enacted in 1870 to put the State banks upon an equality with the national banks should have the same interpretation and effect as is given to the act of congress. Any other interpretation would do violence to the clearly expressed will of the legislature, do injustice to the State institutions, and give undue effect to the legislation of congress so far as it is hostile to the State banks. Both cases may, therefore, be regarded as overruled.

The plaintiff was, upon the facts found by the trial court, entitled to a judgment for the penalty given by the act of congress, when a greater rate of interest than is allowed by law has been actually paid (U. S. R. S., § 5198); and the sole question is whether the penalty should be twice the amount of the entire interest paid or twice the amount of the excess of legal interest only. The language of the statute is not so explicit as to render its interpretation free from difficulty. The clause under which this action is brought is penal in its character, and therefore should be strictly construed; that is, not extended by implication so as to give a greater penalty than that which the terms of the act will clearly warrant. The first clause of the section forfeits the entire interest whenever interest greater than is allowed by section 5197 is either received or reserved; but it would seem that this forfeiture attaches, and is enforced only in actions brought upon or to enforce the usurious contract. It limits the right of the recovery by the plaintiffs in such actions to the money actually loaned without interest. The other clause of the section, in declaring the penalty which a party paying the illegal interest may recover, employs different language. It enacts that "in case a greater rate of interest has been paid" than allowed by law, "twice the amount of the interest thus paid may be recovered from the association taking or receiving the same." The language of the act is satisfied by restricting it to the interest paid in excess

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Opinion of the Court, per ALLEN, J.

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of the legal rate. It seems to have respect to "the greater rate" as distinguished from the entire interest mentioned in the first paragraph of the section. "The greater rate" does not necessarily include the legal rate of interest, and when the statute declares that twice the amount of the interest "thus paid" may be recovered, it may well be held to mean twice the amount paid as and for "the greater rate" that is in excess of the lawful interest. With great hesitation I incline to favor this interpretation of the penal clause under consideration. I am the more inclined to this view of the statute by reason of the general character of the legislation of congress in respect to national banks. If these institutions are not, as is said in *Tiffany v. Nat. Bk. of Missouri* (18 Wall., 409), "national favorites," they have been greatly favored by congress to the prejudice of the State banks, and it cannot be supposed that congress would impose very stringent burdens or very heavy penalties upon them in matters in respect to which they might come in conflict with State banks. The policy of the legislation by congress, as intimated in *Tiffany v. Bank of Missouri (supra)*, was to give advantages to national banks over their State competitors. In this view of the policy of congress the lower penalty must be assumed to have been intended in the use of the ambiguous phrase of the statute. When the act forfeits the entire interest, the forfeiture is only of the one sum reserved as interest; while, in giving penalty of twice the amount, the usurious interest only is doubled. If this is not so, the borrower would be the gainer by paying the usurious interest, and suing at once to recover twice the amount, while by resisting payment he could only save the one sum. The Supreme Court of Pennsylvania have given the same interpretation to the act of congress, in *Brown v. The Second Nat. Bank of Erie* (72 Penn. St. R., 209). The judgment of the court below should have been a mere reduction of the recovery at Special Term to the amount to which the plaintiff was entitled in accordance with these views. It is objected that but one penalty can be recovered in a single action. The authorities



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Statement of case.

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to which reference is had in support of this objection (*Sturges v. Spofford*, 45 N. Y., 446; *Fisher v. N. Y. C. and H. R. R. Co.*, 46 id., 644), and other cases to which reference might be made, were decided upon the peculiar language of the acts giving the penalties. The act of congress under which this action is brought regulates the recovery by the amount illegally received and taken, and does not give a fixed sum as an arbitrary penalty, and the party entitled to maintain the action is entitled to recover within the terms of the act twice the amount which he has paid for usury within two years prior to the commencement of the action, whether the amount has been paid in one or several payments.

The order of the General Term of the Supreme Court should be modified and the judgment of the Special Term reversed, and a new trial granted, costs to abide the event, unless the plaintiff stipulates to reduce the recovery to \$160 for the penalty; and in case he so stipulates, the judgment to be affirmed for that amount, without costs to either party in this court.

All concur.

Judgment accordingly.

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ROSE CONLIN, Respondent, v. MARY A. CANTRELL, Appellant.

In order to charge the separate estate of a married woman with a debt it is not necessary that there be a specific agreement to that effect. The intent may be inferred from the surrounding circumstances.

Defendant, a married woman, lived separate and apart from her husband. She had a separate estate and supported herself. Plaintiff did work as seamstress, under a contract with her, for herself and children. Defendant, before the work was done, informed plaintiff that she had a separate estate, and plaintiff testified she trusted her for that reason. Defendant promised to pay when she received her rents. In an action to recover for the work, *held*, that the evidence was sufficient to authorize a finding of an intent to charge defendant's separate estate and to sustain a judgment against her.

(Argued February 7, 1876; decided February 15, 1876.)

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Statement of case.

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APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, affirming a judgment in favor of plaintiff of the Seventh District Court of the city of New York.

This action was for work and labor. The defence was coverture. Defendant was a married woman, but lived separate and apart from her husband. She had a separate estate and supported herself and her children with the rents and profits. Her husband did nothing for her support. Plaintiff was a seamstress and was employed by defendant to make dresses for her and her children. Before plaintiff went to work she was advised by defendant that she had a separate estate — that she owned the house — and plaintiff testified she trusted her because she thus learned that she had property. Defendant promised to pay when she got her rents.

At the close of the evidence defendant's counsel moved to dismiss the complaint, on the ground that, as defendant was a married woman, the action could not be maintained. The motion was denied.

*Henry H. Morange* for the appellant. The work done did not benefit defendant's separate estate and plaintiff could not recover for it. (*Second Nat. Bk. of Watkins v. Miller*, 1 N. Y. W. Dig. No. 23, p. 525.) An intention to charge her separate estate could not be inferred from defendant's promise to pay. (*Weir v. Groat*, 4 Hun, 193; *Man. B. and M. Co. v. Thompson*, 58 N. Y., 80; *Mason v. Scott*, 55 id., 251.) Defendant's husband was liable for necessities furnished her, although she had a separate estate. (*Yale v. Dederer*, 18 N. Y., 276; 22 id., 450; *Corn Ex. Ins. Co. v. Babcock*, 42 id., 613; 39 id., 248; 12 J. R., 248.)

*J. Homer Hildreth* for the respondent. Plaintiff was entitled to recover. (2 Story's Eq. Jur., §§ 1400, 1401, p. 626; 2 Roper on Hus. and Wife, chap. 21, § 3, pp. 243, 244, note; id., chap. 22, § 4, pp. 305–307; *Johnson v. Gallagher*, 7 Jur. [N. S.], 273; 1 W. & T. L. Cas. in Eq., 324; *Jacques v. M.*

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Opinion of the Court, per MILLER, J.

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*E. Church*, 17 J. R., 548; 10 Paige, 343; *Yale v. Dederer*, 18 N. Y., 272; *Ballin v. Dillaye*, 37 id., 35; *Gardner v. Gardner*, 7 Paige, 112; *Curtis v. Engle*, 2 Sandf., 287; *White v. McNett*, 33 N. Y., 371; *Corn Ex. Ins. Co. v. Babcock*, 42 id., 645; *Southwick v. Southwick*, 9 Abb. [N. S.], 109; *Kelty v. Long*, 4 N. Y. S. C., 163; *Foster v. Conger*, 61 Barb., 145.) As defendant had no suitable allowance secured to her by her husband she had a right to act as his agent, as far as necessary, to charge her separate estate for necessities for her and her children. (2 Story's Eq. Jur., § 1400, p. 622.) Defendant having voluntarily separated from her husband more than three years before this suit was commenced, she will be considered and treated as a *feme sole*. (*Rhea v. Rhenner*, 12 Wheat., 478; 1 Pet., 105; *Chapman v. Lemon*, 11 How., 235; 59 Barb., 375; 4 Metc., 478.)

MILLER, J. The defendant lived separate and apart from her husband. She had separate property of her own, and he did not support her. The contract of the plaintiff was made with her, and the work done was for herself and children.

She had informed the plaintiff that she had property of her own before the work was done, and the plaintiff swore she trusted her for that reason. After the debt was contracted she promised to pay it as soon as she got her rents, and the proof shows that she received rents on account of her separate property.

It is true the defendant did not agree specifically to charge her separate estate with the debt, but the surrounding circumstances are such as to lead to the inevitable inference that this was her intention. It may well be that a married woman, thus situated, might render herself liable, where the facts indicate, as was the case here, that she was living alone and separate from her husband, supporting an independent establishment, and maintaining herself and family without any regard to him. Although a rigid scrutiny should be exercised, to see that the rights of a married woman are not frittered away by drawing erroneous conclusions from the

## Statement of case.

circumstances surrounding her, there is sufficient evidence here to warrant the inference that she intended to, and actually did, charge her estate for the plaintiff's demand. The labor performed was directly for her benefit and the contract was with her alone.

As the case stood the judgment was fully justified, and as it is upheld by the decisions of the courts, it must be affirmed, with costs.

All concur.

Judgment affirmed.

ELIJAH F. GREENE and HENRY DEAL, Appellants v. JOHN K. WARNICK, Respondent, impleaded, etc.

An assignee of a mortgage takes it not only subject to all the equities existing between the parties to the instrument, but to the equities which third persons could enforce against the assignor.

*Moore v. Metropolitan Bank* (55 N. Y., 41) distinguished.

The provision of the recording act (1 R. S., 756, § 1), declaring every conveyance of real estate void, as against a subsequent *bona fide* purchaser of the same real estate, does not apply where two mortgages are executed at the same time, as neither one, although first recorded, is a subsequent conveyance.

The only effect of recording the assignment of a mortgage, is to protect the assignee from a subsequent sale of the same mortgage; if the assignment be not recorded, it is void as against a subsequent purchaser of the same mortgage.

B. executed at the same time two mortgages on certain real estate, one to M. G., and one to D., which it was understood were to be equal liens and to be recorded at the same time. M. G.'s mortgage was first recorded, and after D.'s mortgage was recorded, was assigned to E. G., and by him assigned to W., both being *bona fide* purchasers for value, without notice of the circumstances. *Held*, that W. took his assignment, subject to all the equities as between M. G. and D., and could claim no priority of lien because of his mortgage being first recorded; that M. G. was not a subsequent purchaser within the recording act, and even if W. could, by virtue of his assignment, be regarded as a subsequent purchaser of some interest in the real estate, he could claim no preference under the statute, as D.'s mortgage was recorded before the assignments.

*Greene v. Deal* (4 Hun, 703) reversed.

(Argued February 8, 1876; decided February 15, 1876.)

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Statement of case.

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APPEAL from order of the General Term of the Supreme Court in the third judicial department, affirming an order of Special Term which overruled exceptions to, and confirmed, the report of a referee determining conflicting claims to surplus moneys arising from sale under judgment in foreclosure. (Reported below, 4 Hun, 703.)

The referee found the following facts among others :

That on the 16th day of May, 1872, the defendants Henry Deal and Mary C. Greene conveyed by warranty deeds, bearing date on said day, the premises mentioned and described in the complaint, to Amos S. Brown, subject to certain liens, among them plaintiff's mortgage ; and said Brown, to secure the payment of a portion of the purchase-price thereof, made and executed two mortgages bearing even date, to wit, May 16, 1872, each for half the amount unpaid. One of the said mortgages was delivered to Henry Deal, and at the same time the other was delivered to Mary C. Greene. That it was understood and agreed by and between said Henry Deal and said Mary C. Greene at the time of the delivery of the said mortgages to them, respectively, that said mortgages should be and were equal liens in all respects upon the premises. That the said mortgage so delivered to Mary C. Greene was duly recorded in the office of the clerk of Montgomery county on the 18th day of May, 1872, at three o'clock in the afternoon. That the mortgage so delivered to Henry Deal was duly recorded in the office of the clerk of Montgomery county on the 18th day of May, 1872, at three o'clock and fifteen minutes in the afternoon. That on the 4th day of September, 1873, the said Mary C. Greene, by an assignment in writing, assigned and transferred to Elijah P. Greene her said mortgage, which assignment was duly recorded in Montgomery county clerk's office on the 15th day of September, 1873. That said Elijah P. Greene, as such assignee, was a *bona fide* purchaser without notice as to the agreement that the mortgage executed by said Brown to said Deal should be an equal lien with said mortgage. That on the 4th day of May, 1874, the said Elijah P. Greene, for a valuable consid-

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Statement of case.

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eration, duly assigned and transferred to defendant John K. Warnick his said mortgage, which said assignment has not been recorded. That Warnick is the *bona fide* purchaser and owner of said mortgage, without notice of any of the circumstances which would have defeated its legal preference over the mortgage executed to said Deal had it remained in the hands of the original mortgagee, Mary C. Greene.

As conclusion of law the referee found that Warnick was entitled to the balance of the surplus money, after paying the liens prior to the two mortgages above described.

*F. S. Westbrook* for the appellant. As to Henry Deal and Mary C. Greene the recording acts did not apply, and neither could gain priority by having his or her mortgage recorded first. (*Jones v. Phelps*, 2 Barb. Ch., 440; *Fort v. Burch*, 5 Den., 184; 1 R. S., 756, § 1; *How. Ins. Co. v. Halsey*, 8 N. Y., 271.) The assignees of Mary C. Greene's mortgage gained no priority by their assignments. (*Trustees Un. Col. v. Wheeler*, 61 N. Y., 88; *Ely v. McNight*, 30 How., 97; *Mickles v. Townsend*, 18 N. Y., 575; *Jackson v. Post*, 15 Wend., 25; *Van Rensselaer v. Clark*, 17 id., 25; 5 Den., 187.) These assignees were charged with direct notice that the two mortgages stood equal, or they were bound to inquire and ascertain the status of the two mortgages. (4 Kent, 179 [m. p.]; *Williamson v. Brown*, 15 N. Y., 354; *Tuttle v. Jackson*, 6 Wend., 226.) Notice to their attorney was notice to them. (*Ingalls v. Morgan*, 10 N. Y., 178.) Neither mortgage was recorded ahead of the other. (1 R. S., 760, §§ 24, 25.)

*Martin L. Stover* for the respondent. Warnick being a *bona fide* purchaser without notice of any equities, was entitled to protection. (*Corning v. Murray*, 3 Barb., 652; *Jackson v. Van Valkenburg*, 8 Cow., 264; *Jackson v. Given*, 8 J. R., 136; *Varien v. Briggs*, 6 Paige, 329; *Webster v. Van Steenburg*, 46 Barb., 212; *Wood v. Chapin*, 13 N. Y., 518; *Livingston v. Dean*, 2 J. R., 479; *Murray v. Lyllburn*, id., 441; *Moore v. Met. Bk.*, 55 N. Y., 41.)

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Opinion of the Court, per EARL, J.

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EARL, J. This is a controversy between Deal and Warnick, appellant and respondent, as to the surplus money arising from a foreclosure of plaintiff's mortgages.

On the 16th day of May, 1872, Henry Deal and Mary C. Greene, being the owners, subject to the plaintiff's mortgage, of the lands sold at the foreclosure sale, conveyed the same to Amos S. Brown, and received from him two purchase-money mortgages, one to each, for the same amount. It was understood by the mortgagees that the mortgages were to be equal liens, that neither was to have priority over the other, and that both were to be recorded at the same time. On the eighteenth day of May the mortgages were taken to the clerk's office, by the husband of Mrs. Greene, and delivered to the county clerk at the same time; but without the knowledge or consent of Deal, he recorded the Greene mortgage at three o'clock p. m., and the Deal mortgage fifteen minutes later, and so certified on the back of the mortgages. In September, 1873, Mrs. Greene assigned her mortgage to Elijah P. Greene, and that assignment was recorded September fifteenth, and he assigned it to Warnick the respondent, in May, 1874; and the last assignment was not recorded. The referee found and reported that Elijah P. Greene and Warnick were *bona fide* purchasers of the mortgage without notice of the circumstances which could prevent either mortgage from taking preference over the other in the hands of the original mortgagee, and that the Greene mortgage owned by Warnick, by virtue of its priority on the record, had priority over the Deal mortgage, and that the entire surplus should be applied thereon.

It is not questioned that if Deal and Mrs. Greene still held the mortgages, neither mortgage could have any preference over the other, and they would be entitled to share equally in the surplus money. Independently of the recording act, Mrs. Greene's assignee would simply take her place, and the mortgage would continue subject to all the equities, both latent and patent, which attached to it before the assignment. This must now be regarded as the settled law in this State, whatever doubts may formerly have been entertained.



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Opinion of the Court, per EARL, J.

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It has been claimed by some judges and decided in some cases, that the only application that can be made of the rule that an assignee of a *chose in action* takes it subject to all the equities existing against it in the hands of the assignor, is that the original debtor can make the same defence against the assignee that he could have made against the assignor. This was the view of Judge HARRIS, in *Corning v. Murray* (3 Barb., 652), and it was upon that principle that he disposed of that case. But in *Bush v. Lathrop* (22 N. Y., 535) Judge DENIO gave the question very thorough consideration, and after examining many authorities, reached the conclusion that the supposed distinction between latent equities and those existing between the parties to the instrument assigned, had no foundation, and that the assignee took the instrument, not only subject to all the equities between the parties thereto, but subject also to all the equities which third persons could enforce against the assignor. While that case has to some extent been overruled by the case of *Moore v. The Metropolitan Bank* (55 N. Y., 41), the law, as announced by Judge DENIO, upon the point now under consideration, was not questioned; and it has been approved in other cases. All that was held in the latter case was, that a wrong application of the law was made in the former case. It was held that a *bona fide* purchaser for value of a non-negotiable chose in action from one upon whom the owner has, by assignment, conferred the apparent absolute ownership, where the purchase is made upon the faith of such apparent ownership, obtains a valid title as against the real owner who is estopped from asserting a title in hostility thereto. The decision was based upon the doctrine of estoppel which precluded the real owner from asserting his title against a *bona fide* purchaser from one upon whom he had conferred apparent ownership, and apparent absolute authority to convey. In *Bush v. Lathrop*, Noble, plaintiff's intestate, owned a bond and mortgage for \$1,400, and being indebted to one Preston in the sum of \$268, gave him his note for that sum, and assigned the bond and mortgage by an absolute and



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Opinion of the Court, per EARL, J.

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unconditional assignment to secure that note. Preston afterward assigned the bond and mortgage to Smith and Newton, and they afterward assigned to the defendant who paid full consideration. These assignments were all absolute in form expressing a full consideration, and there was nothing to impeach the good faith of either of the assignees. Judge DENIO, applying the law as above stated, held that the subsequent assignments were all subject to Noble's prior equities, and that he had the right to redeem. Under the authority of the case of *Moore v. The Metropolitan Bank*, Noble ought to have been held estopped from asserting his title to the bond and mortgage in consequence of his absolute assignment of the same, by which he conferred the apparent ownership upon Preston, and apparent authority to sell; and so far the decision of that case must now be considered to have been erroneous. But in such a case, the estoppel can only operate against the party whose act created it, and cannot affect the rights or equities of other persons. In this case there is nothing to estop Deal. He did nothing to induce a purchase of the Greene mortgage, and neither by his act or omission misled Warnick or his assignor. In *Schafer v. Reilly* (50 N. Y., 61) it was held that one who takes an assignment of a mortgage takes it subject not only to any latent equities that exist in favor of the mortgagor, but also subject to the latent equities in favor of third persons. Judge ALLEN, writing the opinion of the court, cites with approval the opinion of Judge DENIO in *Bush v. Lathrop*, and says that it must, upon this question, be regarded "as a just exposition of the law, as well upon principle as upon authority." The same question came under consideration again in the case of *The Trustees of Union College v. Wheeler*, in the Commission of Appeals,\* and Commissioner DWIGHT, in a learned opinion, reviewing the cases, reached the same conclusion as to the effect of an assignment of a mortgage upon latent equities. He said: "It is well settled that an assignee of a mortgage must take it subject to the equities attending the original

\* 61 N. Y., 88.

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Opinion of the Court, per EARL, J.

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transaction. If the mortgagee cannot himself enforce it, the assignee has no greater rights. The true test is, to inquire what can the mortgagee do by way of enforcement of it against the property mortgaged? What he can do the assignee can do, and no more." In the language of Lord THURLOW, in *Davies v. Austen* (1 Ves., 247), often quoted with approval, "a purchaser of a chose in action must always abide by the case of the person from whom he buys."

We think, therefore, unless the Green mortgage has obtained some advantage in the hands of Warnick by the record, it was not entitled to any priority over the Deal mortgage, and whether it obtained such advantage will now be considered. It is provided (1 R. S., 756, § 1) that "every conveyance of real estate, within this State hereafter made, shall be recorded in the office of the clerk of the county where such real estate shall be situated; and every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith, and for a valuable consideration of the same real estate or any portion thereof whose conveyance shall be first recorded." By subsequent provisions (§§ 36, 37, 38, 41) it is clear that an assignment of a mortgage is a conveyance which may be recorded under the law. An unrecorded conveyance is declared void only as against a *subsequent* conveyance *first* recorded. The Greene mortgage, although first recorded, was not a *subsequent* conveyance, and therefore these two mortgages, executed at the same time, are not within the statute. If Warnick may, by virtue of his assignment, be regarded as a subsequent purchaser of some interest in the real estate, then he can have no advantage from the statute, because Deal's mortgage was recorded before the assignment, and although Warnick held a subsequent conveyance it was not first recorded. When Deal's mortgage was placed upon record, containing a clause, as did the Greene mortgage, that it was given for the purchase-money, it showed that it was given at the same time with the Greene mortgage, and that neither mortgage could have any preference over the other.

But the only effect of recording an assignment of a mort.

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Opinion of the Court, per EARL, J.

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gage is to protect the assignee against a subsequent sale of the same mortgage. If the assignment be not recorded, the assignor can assign to another person, a purchaser in good faith, and for value, who may record his assignment first, and will then hold the mortgage against the first assignee. An assignment is a conveyance of the mortgage which, within the recording act, is a chattel real, and such conveyance, not recorded, is void against any subsequent purchaser "of the same real estate," to wit, the same mortgage. In *Campbell v. Vedder* (3 Keyes, 174), Judge PECKHAM said: "The only alteration made by the recording act of 1830, is that an assignment must now be recorded as against a subsequent *bona fide* purchaser of the mortgage assigned. A 'subsequent purchaser in good faith' in the recording act as to this case, means a purchaser of the mortgage assigned, not a purchaser of the premises." In *Gillig v. Maass* (28 N. Y., 191), Judge WRIGHT said: "The recording statutes only apply to successive purchasers from the same sellers, and the record of the assignment of the mortgage would only be constructive notice of such assignment as against subsequent assigns of the mortgage." And in *Purdy v. Huntington* (42 N. Y., 334, 338, 347), Judges LORR and SUTHERLAND use language to the same effect. As Deal's rights were not derived from Mrs. Greene subsequent to the assignment of her mortgage, and as his equities attached to that mortgage before its assignment, we are of opinion that the recording act has no application to this case, and that the two mortgages must share equally in the surplus in question.

The order of the General Term must be reversed, and that of Special Term modified, so as to divide the surplus as above indicated, the costs of the appellant upon the appeals to the General Term and to this court to be first paid out of the fund, and the respondent to recover no costs.

All concur.

Order reversed and ordered accordingly.

## Statement of case.

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ZINA W. ALEXANDER, Respondent, v. AUSTIN M. HARD et al.,  
Appellants.

The fact that the wife of A. owns the fee of the land on which stands the house in which he lives with his family, is not necessarily inconsistent with his having such a possession of the house as will entitle him to maintain an action against a trespasser for forcibly entering it.

Plaintiff built a house upon the land of his wife, in which he lived with his family, having possession and control thereof. He operated the farm in his own name, owned the stock and provided for his family. In an action for unlawfully and violently breaking into and entering the dwelling-house the court charged that plaintiff could not recover for damages to the house. *Held*, error; that the facts were sufficient to authorize a finding of a possession in plaintiff sufficient to entitle him to maintain the action.

(Argued January 27, 1876; decided February 22, 1876.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, setting aside a verdict for plaintiff and granting a new trial.

This was an action of trespass.

The complaint alleged that defendants with force and arms broke and entered plaintiff's dwelling-house, disturbing him and his family, breaking the hinges and locks of the doors and assaulting plaintiff's wife and children and otherwise injuring him.

The evidence tended to show that at the time of the occurrence in question he was sick and confined to his bed; that defendants came to the house for the purpose of serving a notice of appeal from a Justice's Court judgment, and upon being refused admittance broke open the outside door and after a struggle with plaintiff's wife, son and daughter, forced open the door of an intermediate room and the door of the bedroom where plaintiff was. It appeared that the plaintiff's wife owned the farm upon which the house stood; the house was built by plaintiff. He moved his family into the house and had lived there for six years with his family, during

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Opinion of the Court, per RAPALLO, J.

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which time, as he testified, he had been in possession and had control of the house. He cultivated and worked the farm in his own name, owned the stock and provided for the family.

The court charged, among other things, that plaintiff could not recover damages for the breaking and entering the house, to which plaintiff's counsel duly excepted. The court submitted to the jury the question as to whether plaintiff sustained any personal injuries.

The jury rendered a verdict for plaintiff of five dollars. Exceptions were ordered to be heard at first instance at General Term.

*O. W. Chapman* for the appellants. Plaintiff could not maintain this action. (*Knapp v. Smith*, 27 N. Y., 277; *Gage v. Dauchy*, 34 id., 293, 297, 299; *Vrooman v. Griffiths*, 1 Keyes, 53, 58; *Russell v. Scott*, 9 Cow., 279, 281; *Fox v. Duff*, 1 Daly, 196; *Fasset v. Smith*, 23 N. Y., 252; *Wilcox v. Wilcox*, 48 Barb., 327; 27 N. Y., 277; Laws of 1860, chap. 90, § 1; *Baum v. Mullen*, 47 N. Y., 577, 579; *Reed v. Ganon*, 50 id., 345, 351, 352; *Minier v. Minier*, 4 Lans., 421; 47 N. Y., 467; 49 id., 319; 54 id., 437, 444; *Rowe v. Smith*, 45 id., 230; *Fisk v. Bailey*, 51 id., 150, 152, 153; *Allen v. Cowan*, 23 id., 502, 505.)

*G. W. Hotchkiss* for the respondent. No other question of possession than that of simple occupancy by plaintiff was involved in this action. (1 Chit. Pldgs., 177; 1 Hil. on Torts, 597; *Graham v. Peat*, 1 East, 244; *Harker v. Birbeck*, 3 Burr., 155; *Cary v. Holt*, 2 Stra., 1238; *Lambert v. Stroother*, Welles', 222; *Radborne v. Kennadale*, 3 Salk., 354; *Fassett v. Smith*, 23 N. Y., 252.)

RAPALLO, J. The facts that the plaintiff's wife owned the fee of the land upon which the house stood, and that she resided there *with* him, are not, necessarily, inconsistent with the plaintiff having such a possession of the house as would entitle him to maintain an action against a trespasser for forcibly entering it. The wife had the right to confer upon

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Opinion of the Court, per RAPALLO, J.

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her husband the possession and control of the property ; and if she did so, he was entitled to defend such possession and to maintain an action of trespass against a stranger who should unlawfully and forcibly disturb him in the enjoyment of it. In one sense, it is true, his possession would be hers ; that is to say, it would not be hostile to her title, and would inure to her benefit as that of a tenant inures to the benefit of his landlord ; but, nevertheless, he would have the right to protect it against a trespasser.

The question in this case is, simply, whether facts were proven which would have justified the jury in finding that the wife had put him in possession of the property. If she had, the judge erred in instructing the jury that the plaintiff was not entitled to maintain an action against the defendants for breaking and entering the house ; and the General Term were right in ordering a new trial.

It appeared in evidence that the plaintiff had built the house on his wife's farm ; that he moved his family into it, consisting of his wife and several children, and had lived there with his family for six years ; during which time, he testified, without objection, that he had been in possession of the house and had control of it. It further appeared that he operated the farm in his own name, owned the stock upon it, cultivated it, and provided for his family.

We think that from these facts the jury might well have inferred that his wife had put him in possession of the farm, and consented to his building upon and occupying and cultivating it in his own name and on his own account, for the support of himself and the family. This would be a sufficient possession to entitle him to maintain an action against a trespasser for breaking and entering the house. The plaintiff was the head of the family ; it was his duty to protect and maintain it, and the duty of his wife to live with him. Under the facts of this case it is more reasonable to attribute her presence in the house to a compliance with her marital obligations than to an intention to retain possession of the property.

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Statement of case.

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The order of the General Term should be affirmed and judgment absolute rendered for the plaintiff, with costs.

All concur. MILLER, J., not sitting.

Order affirmed, and judgment accordingly.

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| 64  | 231 |
| 187 | 443 |

ELIHU W. CLARK, Administrator, etc., Respondent, v. JOHN G. SICKLER, Appellant.

An offer upon the part of a principal debtor to pay, and an omission so to do because of a request of the creditor that he retain the money, and the subsequent insolvency of the principal, do not discharge a surety. The act which will discharge a surety must be legally injurious or inconsistent with his legal rights; mere indulgence is not sufficient.

An omission of duty on the part of the creditor and a consequent injury, will not discharge the surety unless he has requested the performance of the duty.

*Lewis v. Van Dusen* (25 Mich., 851), *Joslyn v. Eastman* (46 Vt., 258) distinguished.

(Argued February 4, 1876; decided February 22, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of plaintiff entered upon the report of a referee.

This action was upon a joint and several promissory note made by defendant and one Mott, payable to William S. Wright (plaintiff's intestate) or bearer. Defendant signed as surety in fact for Mott, of which the payee had knowledge. The referee found that after the note became due Mott borrowed the money and went to the house of Wright for the purpose of paying the note and offered the money to Wright's wife, who was his agent; that she declined to receive it for the reason that she or her husband had no use for the money and would rather have Mott keep it. That thereafter Mott became insolvent and has continued so since.

*L. L. Bundy* for the appellant. The transaction between Mott and the payee's agent discharged defendant as surety. (*People v. Janson*, 7 J. R., 332; *Ring v. Baldwin*, 2 J. Ch.,

## Statement of case.

554; *Suprs., etc., v. Dow*, 1 Den., 268; 1 Story's Eq. Jur., §§ 324, 325, 326, note 1; *Reynolds v. Weed*, 5 Wend., 301; *Gahn v. Neimcewicz*, 3 Paige, 613; 11 Wend., 812; *Newman v. Finch*, 25 Barb., 173; *Hart v. Hudson*, 6 Duer, 294; *Grant v. Smith*, 46 N. Y., 97; *Bangs v. Strong*, 10 Paige, 11; 7 Hill, 250; *Ludlow v. Simond*, 2 Cai. Cas., 57; *Fox v. Parker*, 44 Barb., 541; *Miller v. McCann*, 7 Paige, 457; *Rathbone v. Warren*, 10 J. R., 581; *Ruble v. Norman*, 7 Bush. [Ky.], 584; *Wilson v. Edwards*, 6 Lans., 134.) It is enough to discharge a surety that the creditor does an act injurious to the surety, or which his duty to him required him not to do. (*Ring v. Baldwin*, 17 J. R., 384; *Paine v. Packard*, 13 id., 174; *Hubby v. Bown*, 16 id., 72; *Smith v. Townsend*, 25 N. Y., 479; *Billington v. Wagoner*, 33 id., 32; *Chester v. Kingston Bk.*, 16 id., 336; *Burgett v. Ellis*, 45 id., 111; *Schroeppel v. Shaw*, 3 id., 446; *Rees v. Barrington*, 2 Ves., 540; *Boyd v. McDonough*, 39 How., 389; *Wright v. Austin*, 54 Barb., 13; *Thomas v. Stetson*, 59 Me., 229; *Lewis v. Van Dusen*, 25 Mich., 351; *Joslyn v. Eastman*, 46 Vt., 258.) The offer of the money by Mott and the refusal to receive it was a good tender and a defence to this action. (*Coit v. Houston*, 3 J. Ch., 273; *Warren v. Mains*, 7 J. R., 476; *Douglass v. Patrick*, 3 T. R., 683; *Cornell v. Haight*, 21 N. Y., 462, 465; *Messerole v. Archer*, 3 Bosw., 376; *Binkard v. Babcock*, 27 How., 395, 491; *Dunham v. Jackson*, 6 Wend., 22, note a, 35; *Bakeman v. Pooler*, 15 id., 637; *Strong v. Blake*, 46 Barb., 227.) There was an extension of time which discharged the surety. (*Fellows v. Prentiss*, 3 Den., 512; *Myers v. Wells*, 5 Hill, 463; *Hart v. Hudson*, 3 Duer, 304; *Bangs v. Mosher*, 23 Barb., 478; *Holmes v. Dale*, Clark Ch., 73; *Bk. of Albion v. Burns*, 47 N. Y., 175.) There was a waiver of performance. (*Fleming v. Gilbert*, 3 J. R., 528; *Second Nat. Bk. v. Poucher*, 56 N. Y., 352.)

*R. M. Townsend* for the respondent. There was nothing done by the holder of the note, or on his behalf, to extend the



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time of payment. (*Reynolds v. Wood*, 5 Wend., 510; *Smith v. Townsend*, 25 N. Y., 479; *Billington v. Wagoner*, 33 id., 31; *Lowman v. Yates*, 37 id., 601; *Parmilee v. Thompson*, 45 id., 28; *Schroepf v. Shaw*, 3 id., 446; *Second Nat. Bk. v. Poucher*, 56 id., 348; *Cary v. White*, 52 id., 138; 20 How., 72; 43 Barb., 379; 53 id., 533; 46 id., 197; 39 id., 611; 2 Lans., 57; 6 Am. R., 33.) A mere indulgence of the principal debtor will not discharge the surety. (*Thompson v. Hall*, 45 Barb., 214; *Fulton v. Matthews*, 15 J. R., 433; 3 N. Y., 446.) If the transaction with Mott amounted to a promise to extend the time of payment of the note, the same was void for want of consideration. (5 Wend., 510; 1 Am. R. 31; 11 id., 572; 31 Md., 126; 30 Wis., 361; 56 N. Y., 348.)

CHURCH, Ch. J. This action is upon a promissory note made by one Mott, as the principal debtor, and by the defendant's intestate as his surety. The referee found that Mott, the principal debtor, some time after the note was due, went to the holder with the money to pay it, which the latter (by his wife acting for him with authority), declined to receive, giving as a reason that he had no use for the money, and requested that Mott would keep it. It is also found that Mott was then solvent, and afterwards became insolvent, and the question is, whether the surety is discharged. As a matter of abstract equity, the argument is plausible, at least, that inasmuch as the note was not paid by reason of the request of the holder, the latter ought not to enforce it against the surety after the principal debtor had become insolvent. The general rule applicable to the relation of creditor and surety is stated by Judge STORY as follows: "If a creditor does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged, and he may set up such conduct as a defence to any suit brought against him." (1 Story's Equity, §§ 325, 326,

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and cases cited in note.) The current of authority, which I think is quite harmonious, establishes that the act which will discharge a surety must be legally injurious or inconsistent with his legal rights. An agreement with the principal debtor extending the time of payment, or in any manner changing the contract made by the surety, will have that effect. So the release of a security held by the creditor and the like. The facts found by the referee do not present a case within the rule. The contract was not changed. The time was not extended by any binding agreement. An action might have been brought immediately after the transaction in respect to the payment, and the circumstances which took place would not have constituted a defence. It is well settled that mere indulgence will not discharge a surety. (45 Barb., 214; 3 N. Y., 446; 15 J. R., 433.) The holder preferred not to collect the note, and gave indulgence, but not a stipulated extension. The other principle referred to is, that the surety may be discharged from an omission of duty on the part of the creditor, but the surety must intervene and request the performance of the duty. It has been established, accordingly, that if a surety request the creditor to sue, and the latter neglects to do so, the surety will be discharged if the neglect has produced injury. (25 N. Y., 552.) Here there was no request. The surety did nothing. He was not prevented from demanding prosecution by the creditor, nor from paying the note and prosecuting the principal himself.

We are now asked to go a step further and hold that if a note is not paid because the creditor prefers to give indulgence rather than receive payment, the surety is discharged if the principal debtor happens to become insolvent. We have not been referred to any authority for such a precedent. The case of *Lewis v. Van Dusen* (25 Mich., 351) was upon a guaranty of collection. It does not appear distinctly upon what ground the court placed its decision; but the question of diligence was necessarily involved, besides the refusal to accept the money when offered, and there was a neglect to prosecute for two years, during which the guarantor became

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Opinion of the Court, per CHURCH, Ch. J.

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insolvent. The decision was clearly right without the fact of the offer to pay, and that circumstance only aggravated the *laches*. In the case cited from 46 Vermont (258) there was a tender of the money due, which was held to discharge the surety, although not accepted. On the other side, the recent case in this court of *The Second National Bank of Oswego v. Poucher* (56 N. Y., 348) decided that where a debtor owing two demands offered to pay one of them, and was induced by the creditor to pay the other, the indorsers upon the demand not paid were not discharged. The circumstances which will discharge a surety are well defined by repeated adjudications, viz.: The doing an act which is legally injurious to the surety, or which impairs his legal rights, or the omission to perform a duty when required by a surety, which omission results in injury to the surety. Indulgence to a debtor is not sufficient, and the distinction is not apparent between indulgence, with the expressed consent or even request of the creditor, and mere silent delay, provided the contract is not changed or impaired. It is a common occurrence for debtors to ask indulgence without any specified time, and creditors would constantly be in danger of losing their debts by mere negative acquiescence. The facts presented in this case rarely occur. It is not often that the debtor omits to pay at the request of the creditor, but if we enlarge the grounds for discharging a surety in such a case, we shall establish a precedent which may prove highly injurious in unsettling and weakening the obligations of written instruments. It is better to adhere to established general rules than to attempt to work out equity in exceptional cases.

It is quite evident that the creditor had no idea of discharging the surety. He did not prevent the payment of the note. He did not refuse to receive the money. He only expressed a desire that it should not be paid. There was no tender or attempt to tender the money. The contract was not changed. The surety did not intervene and request any action on the part of the creditor; and although loss has

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occurred in consequence of the indulgence, it cannot be affirmed that the creditor did any act impairing the legal rights of the surety, nor did the latter take any action to relieve himself from liability.

The judgment must be affirmed.

All concur.

Judgment affirmed.

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| 64  | 236  |
| 172 | *101 |

PETER Boos, Respondent, v. THE WORLD MUTUAL LIFE INSURANCE COMPANY, Appellant.

In an action upon a policy of life insurance the defence was the falsity of various answers to questions in the application which were, by the terms of the policy, made warranties. After the defendant's counsel had, upon the trial, specified certain answers which he claimed to be false, on motion to dismiss, in exceptions to the submission of questions to the jury and in requests to charge, he requested the court to charge that upon the policy and the evidence the plaintiff could not recover any thing beyond the amount of the last premium. *Held*, that the general objection did not entitle defendant to raise on appeal points as to the falsity of answers which were not specified, and as to which no question of law was raised and passed upon on the trial.

In answer to a question as to whether he had had, during the last seven years, any severe sickness or disease, the insured answered "No." The policy was issued in 1870. Evidence was given showing that in 1865, the insured had an attack of pneumonia which lasted ten days, during which he was attended by a physician. Plaintiff's witnesses testified that during this time he was a strong, healthy man. One witness, not shown to be competent to speak as to the nature of the illness, testified that plaintiff had sunstroke in 1863, or 1865. *Held*, that the court was not bound to decide, as matter of law, that either was "a severe sickness or disease" within the meaning of the question, and that the question of a breach of warranty was one of fact for the jury.

A General Term has no power to review a case upon the facts on appeal from the judgment where the trial was by jury; the only mode in which the facts can be brought before it for review is by appeal from order of Special Term or Circuit granting or refusing a new trial.

(Argued February 9, 1876; decided February 22, 1876.)

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Statement of case.

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APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of plaintiff entered upon a verdict. (Reported below, 4 Hun, 133.)

This was an action upon a policy of life insurance, issued by defendant in March, 1870, on the life of Valentine Boos, plaintiff's assignor, and also to recover a payment of premium made after the death of the insured.

Boos died abroad. Plaintiff paid the last premium after his death, the company promising to pay it back if he was dead. The defence was breaches of warranty.

It was stated in the policy that it was issued on the condition that the statements and declarations of the insured, in his application, were in all respects true, without the suppression of any facts relating to the health or circumstances of the insured. In the application, the question was asked as to the employment of the insured; the answer was "gardener." He was asked as to whether he had certain diseases, pneumonia and sunstroke were not enumerated. He was asked whether he had had, during the last seven years, any severe sickness or disease. The answer was "No." In answer to the question as to whether the insured had employed or consulted individually, any physician, the answer was "No; my family physician is Dr. Hertzog, Newark; only for a cold."

Evidence was given, on the part of defendant, to the effect that in May, 1865, the insured had pneumonia, and was treated by Dr. Kuchler; was sick about ten days. A sister of plaintiff testified that the insured had a sunstroke in 1863, or 1865; was sick eight or ten days. Several of plaintiff's witnesses testified in substance that from 1863 to 1870, the insured was a strong, healthy man, doing severe manual labor, such as carrying castings and iron in a foundry, digging cellars, tending mason, etc.

At the close of the testimony, defendant's counsel moved for a dismissal of the complaint upon the ground that a breach of warranty had been shown in the answers to the questions as to whether the insured had had any of the diseases speci-

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fied, and also because it was uncontradicted he had pneumonia in 1865, and had sunstroke within seven years. The motion was denied and defendant's counsel duly excepted.

The court charged, among other things, that if any of the answers to the questions in the application were false, whether the insured knew it or not, plaintiff could not recover. The court then referred to the answers to the questions as to certain specified diseases, as to his having any severe sickness or disease, and as to the physician employed.

Defendant's counsel excepted to the submission to the jury of the question of the falsity of the answers in regard to previous sickness. Said counsel requested the court to charge that in 1865 the insured had an attack of pneumonia which lasted ten days, during which he was attended by Dr. Kuchler. The court charged that if the jury found so, and that it was a serious disease, it voided the policy. To the refusal to charge, and to the modification as charged, said counsel excepted. After various other requests, he further requested the court to charge that, upon the evidence, plaintiff could not recover for any thing beyond the amount of the last premium paid with interest. The court refused so to charge, and said counsel duly excepted.

A further request was made to charge that if the insured had sunstroke within seven years, that fact should have been disclosed to defendant. The court answered: "Yes, if the jury find it a serious or severe sickness or disease, or fairly covered by any question or answer in the application." To the refusal to charge, as requested, and to the charge, as made, said counsel excepted.

The jury found a verdict in favor of plaintiff, for the amount of the policy and the last premium.

*Joshua M. Van Cott* for the appellant. The statements in the application for insurance were warranties, (*Ripley v. Aetna Ins. Co.*, 30 N. Y., 136; *Snow v. Col. Ins. Co.*, 48 id., 627; *Higbie v. Guard. Mut. Ins. Co.*, 53 id., 603; *Pierce v. Emp. Ins. Co.*, 62 Barb., 636; *First Nat. Bk. v. Ins. Co.*

## Opinion of the Court, per RAPALLO, J.

*No. Am.*, 50 N. Y., 45; *Anderson v. Fitzgerald*, 4 H. L. Cas., 484; *Jeffries v. Economical M. L. Ins. Co.*, MS. Op. U. S. S. Court; *Smith v. Aetna Life Ins Co.*, 47 N. Y., 211.) The false answer respecting the medical attendant of the insured avoided the policy. (*Gibson v. Am. Mut. L. Ins. Co.*, 37 N. Y., 580; *Smith v. Aetna L. Ins. Co.*, 49 id., 215; *Monk v. Un. Mut. L. Ins. Co.*, 6 Robt., 455; *Brit. Eq. v. G. W. R. Co.*, 3 Big. L. Ins. Cas., 264; *Price v. Phœnix M. Ins. Co.*, id., 642, 643; *Huckman v. Fernie*, 3 M. & W., 505; *Everett v. Desborough*, 5 Bing., 503; *Morrison v. Muspratt*, 4 id., 60.) The insured was guilty of intentional misrepresentations, which avoided the policy, and it was the duty of the court to direct a verdict for only the overpaid premium. (*Matthews v. Coe*, 49 N. Y., 60; *Mason v. Lord*, 40 id., 476; 47 id., 566; *Lomre v. Meeker*, 25 id., 361; *Ryder v. Wombwell*, L. R., 4 Exch., 38, 39.)

*John H. Bergen* for the respondent. The finding of the jury upon the question whether the questions specified were falsely answered was conclusive. (*Fireman's Ins. Co. v. Waldron*, 12 J. R., 513; *Gates v. Mad. Co. Mut. Ins. Co.*, 2 N. Y., 43; *Nelson v. People*, 23 id., 298; *Carpenter Co. v. Hayward*, 1 Doug., 374; 1 Phil. Ev. [10th ed.], 4.) The only matters available to defendant as a defence, were those specifically set up in the answer. (*Valton v. Nat. Ins. Co.*, 20 N. Y., 36.)

RAPALLO, J. Two of the points upon which the appellant relies on this appeal, viz., the falsity of the statement of the assured, that his occupation was that of a gardener, and the falsity of the statement that Dr. Hertzog was his family physician, do not appear to have been taken at the trial.

The motion to dismiss the complaint was based upon two grounds only, viz., that a breach of warranty had been shown in the answers to the questions as to whether the assured had had any of the diseases, etc., mentioned in the questions; also that the evidence was uncontradicted as to his having had



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pneumonia and sunstroke. No allusion was made to the statements respecting the occupation of the assured, or who was his family physician.

The judge charged the jury that if any of the answers made by the assured, to the questions contained in the application, were false, whether the assured knew them to be so or not, the policy was dead; and he enumerated and read to the jury the answers which were claimed by the defendant to be false. In making this enumeration he omitted any reference to the answer as to the occupation of the assured; but no objection was made by the defendant's counsel to such omission; nor was any request made that any thing be submitted to the jury on that point. The judge did embrace in the enumeration the answer as to the family physician; but no exception was taken to the submission of that question to the jury, although exception was taken to the submission to them of the question of the falsity of the answers in regard to the previous sickness of the assured and to various parts of the charge in reference to his illness, diseases, etc.

At the close of the case, after numerous requests to charge and exceptions, the defendant requested the court to charge that, upon the policy and the evidence the plaintiff could not recover any thing beyond the amount of the last premium paid, with interest; and the defendant now claims that this general request was sufficient to raise the two points now under consideration. We think not. Rulings tending to the same result had been asked for on various points which were specified. After these rulings had been refused, the defendant could not, by this general request, entitle itself to raise on appeal points which had not been specified, and which, if the attention of the court had been called to them, might have been met by further proof on the part of the plaintiff. In no part of the trial were any questions of law relating to these two answers specifically raised or passed upon, and it is too late to raise them here for the first time.

The next point taken on this appeal is, in substance, that the judge erred in submitting to the jury the question



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Opinion of the Court, per RAPALLO, J.

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whether there had been a breach of warranty in respect to the previous illness of the assured. It is claimed that the proof was uncontradicted that he had had pneumonia, in 1865, which lasted ten days, during which he was attended by a physician, and that he had sunstroke in 1863, or 1865 ; and the defendant's counsel contends that this was conclusive proof of the falsity of his answer to the question whether he had during the last seven years had any severe sickness or disease. The policy was issued in March, 1870.

We think that the judge was not bound to determine, as matter of law, that these were severe sickness or diseases within the meaning of the question propounded by the company. They were not among the diseases enumerated in the interrogatories contained in the application ; and we think that whether they were severe, within the meaning of the question, was matter of fact which was properly left to the jury. As to the sunstroke there was no medical testimony, but only that of a sister of the plaintiff, who said that the deceased had a sunstroke in 1863 or 1865, and was sick then eight or ten days. She was not shown to be competent to judge even whether it was in fact a sunstroke, and certainly the judge was not required to decide, as matter of fact, that it occurred within seven years before the date of the application, which was March 27, 1870, the witness stating only that it was in 1863 or 1865. As to the pneumonia, the evidence was that it lasted ten days, during which the deceased was attended by a physician ; and the judge was in various forms requested to decide that this constituted a breach of warranty, which he declined to do. These requests not only required the judge to find, as matter of fact, that the illness testified to by the physician, was severe, but also to disregard the testimony of various witnesses who testified to the condition of the health of the assured during the period in which the illness was located, and to his being a sound, healthy man, performing work requiring considerable strength. The judge left the question to the jury, and in so doing we think he committed no error.

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It is further urged that the General Term erred in holding that they could not set aside the verdict as against the weight of the evidence — the appeal being from the judgment only. In this the General Term was clearly right; an appeal from the judgment, when the trial is by jury, brings up questions of law only. (Code, § 348.) A motion for a new trial on the evidence can only be made at the Circuit or Special Term. (Id., § 265.) And from the order granting or refusing such new trial, an appeal may be taken to the General Term. (Id., § 349.) This is the only mode in which the General Term can acquire jurisdiction to review a case upon the facts, when the trial is by jury.

In the present case there does not appear to have been any appeal from an order refusing a new trial, but only an appeal from the judgment. The case states that after the verdict was rendered, the defendant moved for a new trial, on the judge's minutes, and that the motion was denied, and an exception taken. But such an exception is not available for any purpose. On trials by jury the only subjects for exceptions are rulings at the trial. The motion for a new trial is a proceeding subsequent to the trial, and the order made on such motion is reviewable only by appeal.

The judgment must be affirmed.

All concur.

Judgment affirmed.

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ADAM D. WHEELOCK, Assignee, etc., Respondent, v. HENRY M. LEE, Appellant.

The right of a borrower to recover the excessive interest upon a usurious loan is assignable, and upon execution of an assignment in bankruptcy by the borrower vests in the assignee.

This remedy existed prior to its affirmance by the statute of usury (1 R. S., 772, § 3), and it was not the intent of that statute to confine it to the borrower alone.

This right to recover the usurious excess does not accrue until after the loan, with legal interest, has been paid.

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Statement of case.

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An assignee in bankruptcy, however, cannot maintain an action to compel a lender to deliver up collaterals turned out by the bankrupt to secure an usurious loan or to have an obligation given by him therefor declared void without paying or offering to pay the sum loaned. He is not a "borrower" within the meaning of the statute (chap. 480, Laws of 1837), authorizing a borrower to file his bill for relief without payment or deposit of the sum loaned; that word designates only the party bound by the original contract to pay the loan.

(Argued February 7, 1876; decided February 22, 1876.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

This action was brought by plaintiff as assignee in bankruptcy of the firm of Tremain & Bro., to recover moneys alleged to have been paid by his assignors to defendant in excess of legal interest on various loans; to have a promissory note made by the bankrupt firm and delivered to defendant upon an alleged usurious loan, surrendered up and canceled, and to compel defendant to deliver up certain promissory notes, alleged to have been transferred to him by said firm as collateral security for certain usurious loans. Plaintiff asked for an injunction restraining defendant from disposing of the collaterals or from proceeding to collect them.

The court found the making of various usurious loans by defendant, as alleged, and the taking of excessive interest thereon; that defendant had in his hand the securities claimed to have been turned out as collaterals, and that they were so received by him, and that he held the note of the firm for one of the loans; the amount paid upon the loans, aside from the interest, does not appear. The court found, as conclusions of law, that plaintiff was entitled to the relief sought, and judgment was entered accordingly. Further facts appear in the opinion.

*Geo. W. Van Slyck* for the appellant. The right to sue for the excess of interest paid did not pass to plaintiff as assignee by virtue of the assignment in bankruptcy. (*Post v. Bk. of Utica*, 1 Hill, 391, 407; *Vilas v. Jones*, 1 N. Y.,

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Opinion of the Court, per ANDREWS, J.

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280; 2 Edm. Stat., 503, § 7, art. 1, title 6, part 3; *Draper v. Trescott*, 29 Barb., 407; *Bellard v. Raynor*, 30 N. Y., 197; *Boughton v. Smith*, 26 Barb., 635; 22 Vt., 536; *De Wolfe v. Johnson*, 10 Wheat., 367, 393; *Reading v. Weston*, 7 Conn., 413.) This right is not assignable. (30 N. Y., 197; *Sands v. Church*, 6 id., 347; *Q. and M. R. R. Co. v. Kasson*, 37 id., 224; *Chamberlain v. Dempsey*, 36 id., 148, 319, 326; *Mech. Bk. v. Edwards*, 1 Barb., 271; 2 id., 345; 7 Hill, 391.) No recovery could be had until a tender and demand had been made. (*Potter v. Cogswell*, 4 N. B. R., 19; *In re Griffiths*, 3 id., 179; *Brownley Assn. v. Smith*, 5 id., 152; 1 N. Y., 274; *Schermerhorn v. Talman*, 14 id., 93, 127; *Rexford v. Widger*, 2 id., 131; *Allerton v. Belden*, 49 id., 373; *Boughton v. Smith*, 26 Barb., 635; *Cook v. Whipple*, 55 N. Y., 150; 7 Hill, 391; *Minturn v. F. L. and T. Co.*, 3 N. Y., 500; *In re Prescott*, 9 N. B. R., 386; *Boughton v. Bruce*, 20 Wend., 234; 10 Bosw., 206; 4 Den., 51.)

*B. E. Valentine* for the respondent. The causes of action alleged in the complaint were assignable and passed to plaintiff. (*Meech v. Stoner*, 19 N. Y., 26; *Wheelock v. Lee*, 15 Abb. Pr. [N. S.], 24.) No tender or demand was necessary. (5 Ed. R. S., 73, § 8; *Schroeppel v. Corning*, 5 Den., 236.)

ANDREWS, J. The assignee in bankruptcy, by virtue of section 14 of the bankrupt act (14 U. S. Stat. at L., 522), upon the execution of the assignment becomes vested with the title to the property and estate of the bankrupt, including debts due to him, his choses in action and rights in action for property and estate, or on contract; and the section declares that the assignee shall have the like right to sue for and recover the same as the bankrupt might or could have had if the assignment had not been made. The plaintiff, in June, 1873, was appointed assignee in bankruptcy of the firm of Tremain & Bro., and this action is brought by the plaintiff, as assignee, for the purpose, in part, to recover excess of interest alleged to have been paid, within a year before the commence-

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ment of the action by the bankrupts, to the defendant on usurious loans made by the defendant to them. It is claimed by the defendant that the right of the borrower to recover back usurious interest paid by him is strictly a personal right, and did not pass by the assignment to the plaintiff. Interest paid by the borrower to the lender beyond the lawful rate is received by the latter without right, and in violation of the statute. It is regarded as having been exacted from the borrower by duress, and the payment is not voluntary, so as to bring the transaction within the principle which precludes a recovery back of money voluntarily paid. The borrower never parted with his title to the money which he seeks to recover. It belonged to him after the payment as before, and the lender wrongfully deprived him of it. The law allows him to maintain the action to reclaim the money, not as a penalty against the usurer, but because the usurer never acquired any title to it. The right of the borrower to recover the excessive interest paid on a usurious loan is expressly affirmed by our statute of usury. (1 R. S., 772, § 3.) But this statute did not give the remedy. It existed before upon the principles of the common law. (Doug., 697, notes; *Briggs v. Thompson*, 20 J. R., 292; *Palen v. Johnson*, 50 N. Y., 49.)

In *Palen v. Johnson* it was conceded that the principal, if not the only change made by our statute, was to limit the time within which the borrower could bring the action. The cause of action in favor of the borrower is founded upon the unlawful possession by the lender of the borrower's money. The claim has relation to his property, and it is entirely unlike a strictly personal injury where the cause of action does not survive, and is not assignable. The language of the bankrupt act is broad enough to vest in the assignee a right of action of this character, and our statute was not intended to confine this remedy to the borrower alone, and to exclude those who stood, in respect to the claim, in privity with him. The statute authorizes a recovery to be had by the person who paid the unlawful excess, or his "personal representa-

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tives," and, in view of the pre-existing law, assignees must be regarded as included.

In *Bosanquett v. Dashwood* (Cas. Temp. Talbot, 38) a bill was filed by the assignee of a bankrupt against the executor of the lender to compel the defendant to account to the plaintiff for sums in excess of lawful interest paid by the assignor to the defendant's testator on loans made by the latter, and the master of the rolls decreed that the defendant should account, and his decree was affirmed. (See, also, *Dey v. Dunham*, 2 J. Ch., 181; *Palmer v. Lord*, 6 id., 95.) These cases, we think, sustain the right of the assignee in this case to bring the action to recover the excess of interest unlawfully exacted by the defendant from the assignors.

But the right to recover the usurious excess does not accrue until after the loan with legal interest has been repaid. (Doug., 697; *Briggs v. Thompson*, *supra*; see remarks of PAIGE, J., 2 Seld., 113.) In this case several distinct loans were made by the defendant, on which excessive interest was taken. Whether any of them have been fully repaid does not distinctly appear, but we cannot say, upon the case as presented, that a recovery to some extent was not justified. We are, however, of opinion that the judgment must be reversed on another ground.

The plaintiff, in addition to the claim to recover the usurious interest paid by his assignor, set out in his complaint that the defendant held certain notes of third persons which Tremain & Bro. had turned out to him as collateral security for the usurious loans specified in the complaint, and also the note of the bankrupt firm for \$1,200, given for one of the loans; and he asked, as part of his relief in the action, for judgment that the defendant be directed to deliver the collateral notes to the plaintiff, and that the note of the bankrupt be declared void, and be delivered up to be canceled; and he prayed for an injunction meanwhile restraining the defendant from disposing of the notes, or from proceeding to collect them. The plaintiff neither in his complaint nor on the trial tendered or offered to pay the balance due on the loans,

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although it clearly appeared that the money loaned by the defendant to Tremain & Bro. exceeded the amount he had received, including the excessive interest. The relief which the plaintiff sought in respect to the surrender and cancellation of the notes held by the defendant could, prior to the Code, only have been obtained in chancery, and until the statute of 1830, as modified by the act of 1837, it would only have been granted on the condition that the money loaned should be repaid. That statute gave to the borrower a new remedy, and allowed him to file his bill for relief without paying or offering to pay the sum loaned, and declared that the court should not require or compel the payment or deposit of the sum loaned, or any part thereof, as a condition of granting relief. The courts, in construing the fourth section, have given a strict meaning to the word borrower, and have held that it designates only the party who is bound by the original contract to pay the loan. (*Post v. The Bank of Utica*, 7 Hill, 391; *Vilas v. Jones*, 1 Comst., 274; *Rexford v. Widger*, 2 id., 131; *Schermerhorn v. Tallman*, 4 Kern., 94; *Allerton v. Belden*, 49 N. Y., 373.)

Under this construction, the purchasers from the borrower and his assignee are held not to be borrowers within the section. The case of *Schermerhorn v. Tallman* is a strong illustration of the strict construction placed on this section. There the original borrower, who had incumbered his property with usurious liens, was declared a bankrupt, and his property vested in the assignee in bankruptcy. Afterwards he reacquired title by purchase from the assignee, and, on a bill filed by him to cancel the usurious liens, it was held that he was not a borrower so as to be entitled to relief without paying the amount actually loaned with interest, but stood in the position or upon the right of a purchaser simply of the property covered by the usurious lien. SELDEN, J., said: "It is by virtue of the title acquired at the sale alone that he comes into court, and the circumstance that he is the same person who was once entitled to relief as a borrower is a mere accident which cannot affect his rights. He can claim

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the same relief to which the assignee in bankruptcy or any other purchaser under him would be entitled. If he asks equity, therefore, he must do what equity requires.”

The plaintiff here is not within these decisions a borrower. He is an assignee by operation of law, and was bound to pay the sum loaned as a condition to the granting of equitable relief in respect to the securities held by the defendant. We are not called upon to consider what his position would have been if he had brought trover or replevin to recover the value or possession of the notes. The action is not of that character. The court refused to find that the loan was not fully paid. The fact was clearly established, and the refusal to find a material fact proved, and as to which there was no conflict of evidence, was error, and the judgment must, for that reason, be reversed. This renders it unnecessary to consider the other questions in the case.

Judgment reversed and new trial granted.

All concur.

Judgment reversed.

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WILLIAM SANDER et al., Appellants, v. GEORGE M. HOFFMAN  
et al., Respondents.

Where A. sells out the stock and good-will of a retail business to B., covenantee, enanting not to engage in, or carry on, the same business within certain limits, it is not necessary, in order to establish a breach of the covenant, to show that A. has solicited custom within the prescribed limits; if he, having established himself in the same business outside of the district, systematically and for profit, to an extent to constitute the carrying on of a business, sends to the houses of customers within the district, receives orders and delivers goods; this is a breach of the covenant, although it be done at the request of the customers and without his solicitation.

If, occasionally, to oblige an old customer, A. sells to him goods, this is not a breach.

(Argued February 8, 1876; decided February 22, 1876.)



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Opinion of the Court, per RAPALLO, J.

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APPEAL from judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of defendants entered upon a verdict, and affirming an order denying a motion for a new trial. Reported below, 7 J. & S., 307.)

This action was brought to recover a sum fixed as liquidated damages for breach of a covenant.

The defendant, George Hoffman, had, prior to May 1, 1871, been engaged in a retail business in the city of New York, as a dealer in meat, fish, vegetables and provisions. On that day he sold out to plaintiffs his stock in trade, fixtures, etc., and the good-will of the business, and in consideration of the purchase, defendants covenanted that they would neither "jointly or severally, as agent or principal, engage in or carry on any similar or competitive retail butcher, and fish and vegetable and provision business, for a period of five years from the date of the agreement," within certain prescribed limits. The facts and the questions raised upon the trial appear sufficiently in the opinion.

*Charles H. Smith* for the appellants. Defendants were guilty of acts which constituted a breach of their contract with plaintiffs. (Bump's Pr. [8th ed.], 456; *Parker Mills v. Comr. Taxes*, 23 N. Y., 242; 4 Campbell's Lives Ch. Just.; *Corn. Ex. Ins. Co. v. Babcock*, 42 N. Y., 613.)

*John L. Hill* for the respondents. In doing the acts complained of, defendants did not engage in, or carry on, a similar or competitive business. (*Turner v. Evans*, 2 El. & Bl., 512, 518; 2 De G., M. & G., 740; *Lee v. Erhart*, 19 L. T. [N. S.], 637.)

RAPALLO, J. The covenant, for the breach of which this action was brought, was, that the defendants would not engage in or *carry on* the specified business during five years from the date of the agreement, within certain limits, in the city of New York. This covenant was given in connection with a sale, by the defendants, of their establishment, within

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the described limits, and of the good-will of the business, which the defendants had previously carried on there, and was intended to secure to the plaintiffs the enjoyment of such good-will, and protect them against competition by the defendants.

No question is raised as to the validity of the covenant; and the only point litigated at the trial was whether it had been broken by the defendants.

The business was the retail butcher, fish, vegetable and provision business. The plaintiffs, in support of their allegation of the breach of the covenant, proved that in May, 1872, a year after the covenant was made, the defendants set up a similar establishment to that which they had sold to plaintiffs, a short distance outside of the prescribed limits, but supplied some of their old customers residing within said limits, by sending daily to their residences a wagon, with the provisions which they needed, and receiving through the messenger who carried them, orders for the following day, and so on from day to day.

The number of customers shown to have been thus supplied was few; only four instances were shown upon the trial. One customer was thus supplied for only a few weeks; one for about four months, to the amount in the aggregate of \$180; one from October, 1872, to the time of the examination of the witness; the other from the time the defendants opened their new store, in 1872, down to the time of the examination of the witness, in March, 1873. The amount of the business thus done does not appear.

There was evidence that the custom of these persons, or some of them, had been solicited by the defendants; this was denied by the defendants, who claimed that the customers voluntarily and without solicitation proposed to deal with them on being informed that they had resumed business.

The judge charged the jury that if they found that the defendants themselves, or by their agents, went into the prescribed limits and there solicited or procured orders for meats, etc., and that the defendants received and filled such orders,

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it was a breach of the covenant; but that if they found that the defendants did not go into the prescribed limits and procure such orders, but that the persons within such limits voluntarily and without solicitation of defendants gave them orders (and whether they gave their orders within such limits or otherwise was immaterial), the filling of such orders was not a breach of the covenant. Exception was duly taken to this last proposition.

The jury having retired afterward returned and asked the court this question: "Is the sending an agent, every day, to the houses in the limited district, to take orders and filling them, a competitive business, or soliciting the same?"

To which the court replied: "In the construction I have given the contract it would not be; the orders must have originally been procured by the solicitation of the defendants. If they proceeded from the customers, and not by the procurement of the defendant, it was not a breach to fill them." Exception was duly taken to this ruling.

The effect of these instructions to the jury was so to limit the operation of the covenant as to restrain the defendants merely from soliciting the patronage of customers within the district, and leave them at liberty to carry on business there to any extent, by sending their wagon daily to houses in the district, receiving orders there and delivering the provisions ordered, provided, the original proposition so to deal proceeded from the customer and not from the defendants. Such a construction of the covenant would, in our judgment, entirely defeat the purpose for which it was taken and, substantially, deprive the plaintiffs of the protection which it was intended to afford them, and in consideration of which they had bought and paid for the good-will of the defendants' business. The business of supplying the inhabitants of the district with meat, provisions, etc., and sending to their dwellings to receive orders, was the very business which the plaintiffs purchased.

If the defendants were at liberty to carry on the same business, naturally their old customers, and those to whom

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they were known by reputation, would prefer dealing with them to employing the new concern. It was immaterial to the customers where the store or shop was, for the supplies were brought to their doors, and orders received there. It was this very good-will—the disposition of the inhabitants of the district to deal with the defendants—which they undertook to sell to the plaintiffs. The covenant of the defendants bound them to do more than refrain from soliciting patronage. It bound them not to carry on the business within the prescribed district, and if applied to for that purpose, it was their duty to decline on the ground that they had covenanted not to do so. The greater the reputation of the defendants' establishment, and the disposition of their former customers to deal with them, the more valuable was the good-will which the plaintiffs purchased; but, upon the construction put upon the covenant by the court below, if the defendants were sufficiently popular to cause their former customers to seek them, they might retain all their former business so long as they did not take the initiative in soliciting the continuance of the custom. In the case of *Smith v. Smith* (4 Wend., 468), which was an action upon a bond given by a physician that he would not locate himself and practice his profession within prescribed limits, and in case he should so locate or practice, that he should pay a certain sum per month, the obligor located himself outside of the limits, but visited patients within them, and he was held liable. It was not intimated in that case that it was necessary to constitute a breach of the condition of his bond to show that he had solicited the custom of his patients. The covenant here is just as absolute as in that case. It is that the defendants will not carry on the business, etc., within the district. It cannot be doubted that sending his wagon and an agent daily within the district, supplying the inhabitants and receiving their orders for further supplies, would be, if carried on to a sufficient extent to constitute a business, a breach of that covenant. What excuse is it to say that these acts were done at the request of the customers?

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The object of the covenant was to secure the withdrawal of the defendants from the business in order that the trade which would have gone to them, had they continued, should go to the plaintiffs. If the defendants continued their business and supplied their former customers or others in the district, the damage to the plaintiffs is the same whether the defendants sought the customers or they voluntarily came to the defendants. If the defendants declined to do the business, as their covenant bound them to do, this trade might have gone to the plaintiffs.

The case of *Turner v. Evans* (2 El. & Bl., 512) is much relied upon by the defendants' counsel to sustain the proposition that to constitute a breach the orders must have been solicited by the defendants.

In that case, the defendant sold the good-will of his business at Carnarvon, and contracted with the purchaser not to carry on the business of a wine merchant there. He set up the business at another place, but had agents at Carnarvon who received orders for wine, which he executed. The fact was in the case that these agents solicited orders, and that fact was commented upon, but was not essential to the decision. The essential ground was, that the defendant supplied wine so systematically within the district as to have made a business of it. The reasoning of the case shows that if he had had an agent within the district, who received orders, even without solicitation, which the defendant supplied, the result would have been the same, and the injury to the plaintiff the same; and that it made no difference whether the wine was supplied from stores within or without the district. In discussing the question of fact, Lord CAMPBELL remarks, that if, to oblige an old customer, he should now and then sell him some wine, that would be no breach, for it would not be carrying on a business, and the same remark would apply to the present case. If, once in a while, to oblige an old customer, the defendants had sent him a piece of meat, the case would be analogous. But that is vastly different from systematically sending an agent every

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day to the houses of his old customers in the district and receiving orders and supplying them.

The true question in the case was, whether the defendants had done these acts systematically, and for profit, to an extent sufficient to constitute the carrying on of a business within the district. If so, it matters not at whose solicitation the dealings were inaugurated. But the case was not disposed of or submitted to the jury on any such question. The ground upon which it was disposed of is, we think, untenable, and the judgment should therefore be reversed, and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

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BYRON SHERMAN et al., Respondents, v. THE HUDSON RIVER  
RAILROAD COMPANY, Appellant.

It is the duty of a common carrier, not only to transport, but to deliver or offer to deliver, goods to the consignee within a reasonable time. Where the consignee is unknown, a reasonable and diligent effort to find and notify him of the arrival is a condition precedent to a right to warehouse the goods. If such effort be not made the carrier is liable for the damages resulting from the neglect.

The measure of damages is the difference in the value of the goods at the time and place they ought to have been delivered and the time of their actual delivery; in fixing the time when delivery should have been made, where there is no charge of negligence in transportation, a reasonable time after arrival should be allowed for delivery.

In the case of the transportation of property over several railroads constituting a connecting line, neither company is agent of the owner; each exercises an independent employment as a contractor with the owner and is responsible for its own negligence, and it cannot make the owner responsible for the negligence of a connecting road.

*It seems*, that if, in an action for negligence, tried by a referee, an express finding of fact that defendant was guilty of negligence is necessary to uphold a judgment, a finding to that effect, although included in the conclusions of law, is sufficient.

Certain bales of cotton owned by plaintiffs were shipped at C., consigned to "Byron Sherman," New York. They were delivered to defendant at

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A., by a connecting line, with a freight bill in which was stated the number of and the marks upon the bales, but the consignee's name was given as "Ryan Sherman." The cotton was transported by the defendant to New York; the name of the consignee was changed by it in its entries and bills to "Ryan & Sherman." Not finding such a firm defendant warehoused the cotton. Byron Sherman called at defendant's freight office in New York, about the time of the arrival of the cotton, and several times thereafter, with the bill of lading containing the number of bales and marks thereon which he exhibited, and inquired for the cotton, but could obtain no information. In an action for negligence, *held*, that plaintiff was entitled to recover; that the evidence was sufficient to justify a finding that the delay and consequent injury was caused solely by defendant's mistake; that while defendant was only chargeable with its own negligence plaintiff could not be made responsible for the negligence of the connecting line.

(Argued February 9, 1876; decided February 22, 1876.)

APPEAL from judgment of the Court of Common Pleas in and for the city and county of New York, affirming a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 5 Daly, 521.)

This action was brought against defendant as common carrier to recover damages for alleged negligence and delay in the delivery of thirteen bales of cotton.

The referee found, in substance, that plaintiff's agents at Cairo, Illinois, shipped the cotton by the Illinois Central Railroad, consigned to an agent of a connecting line at Chicago, to be forwarded to New York. That the bales, at the time of delivery, were marked with a diamond, in which were the letters F. B. Said road executed and delivered to the agents a receipt or bill of lading giving the number of bales and describing them by said mark, with the words "to be forwarded all rail to Byron Sherman, 41 Warren street, New York," which bill of lading was forwarded to plaintiff. That said cotton was transported to Albany and there received by defendant from the New York Central Railroad Company, a bill of charges accompanying it in which the name of the consignee was stated as "Ryan Sherman," but in other respects the cotton was described as in the bill of lading.

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That defendant changed the name of the consignee to Ryan, & Sherman and transported the cotton to New York, where it held it for delivery to Ryan & Sherman. The cotton arrived in New York December 14, 1864. Defendant kept it in its possession until December twenty-first, when it stored it with warehouseman. "That the defendants made no effort to find any consignee of said cotton, except Ryan & Sherman; they made some inquiries for this firm, but these were limited to such persons as came to their depot, and they mailed a notice in the New York post-office of the arrival of this cotton, addressed to such firm of Ryan & Sherman, New York city, but they did not make any effort to find or notify of its arrival Ryan Sherman or Byron Sherman." That the consignee Byron Sherman (one of the plaintiffs), received the receipt, and after a reasonable time for the transmission of the cotton to New York, hearing nothing of it, he went to the general freight office of the defendant, at the corner of Warren street and College place, in New York city, and showed said receipt to the parties having charge of the freight business, and made inquiries for this cotton; that he made applications there repeatedly during the month of December aforesaid, and also during the January following, of a person to whom he was there directed by the employes of the defendant as a proper person of whom to make inquiries; that he told such person when the cotton left Cairo, and that it was due and past due in New York, and on each occasion of his inquiry, exhibited the receipt or bill of lading and that he received no information, and could get none respecting the cotton; that said cotton was not delivered to the consignee, and he heard nothing of it until on or about the 6th day of February, 1865, when he was notified at his store No. 41 Warren street, by a person from the warehouse, that the cotton was there, and the same was on such day delivered on his order to the commission merchants in New York of the plaintiffs, by whom it was afterwards sold for their account. That after the arrival of such cotton in New York, it depre-



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ciated in value, and that the difference in the market value of it at the time of its delivery and the time when it should have been delivered was \$2,674.50. As a conclusion of law the referee found "that the defendants were guilty of negligence, and are liable in damages to the plaintiffs for the loss on such cotton, and for the amount of the expenses and charges paid to the warehouseman."

*Samuel Hand* for the appellant. Defendant was not guilty of negligence in refusing to deliver the cotton to Byron Sherman. (*Hempstead v. N. Y. C. R. R. Co.*, 28 Barb., 486, 501; *McIntee v. N. J. Stmbt. Co.*, 45 N. Y., 34.) Defendant having transported the goods and made unavailing efforts to notify the consignee named, its responsibility as carrier ceased. (Redf. on Railways, § 127; *Thomas v. Bost. R. R. Co.*, 10 Metc., 472; *Witbeck v. Holland*, 45 N. Y., 17; *Parsons v. Hardy*, 14 Wend., 215; *Pelton v. R. and S. R. R. Co.*, 54 N. Y., 215; *Northrop v. S. and B. R. R. Co.*, 2 Tr. Apps., 183.) The negligence of plaintiffs and their representatives having caused or contributed to defendant's failure to deliver to the true consignee, plaintiffs could not recover, even assuming negligence in defendant. (*Nelson v. H. R. R. Co.*, 48 N. Y., 498; *Rawson v. Holland*, 59 id., 617; Redf. on Carriers, § 52; 28 Barb., 485; *Ont. Bk. v. N. J. Stmbt. Co.*, N. Y. C. P., February, 1874; *Taylor v. Gt. N. R. R. Co.*, L. R., 1 C. P., 385.) Defendant was not liable for damages arising from non-delivery of the cotton, during the time it kept the goods to ascertain the owner. (45 N. Y., 34.)

*Henry N. Beach* for the respondents. A carrier is bound to transport goods to their destination and deliver them within a reasonable time to the consignee or owner, by giving notice of their arrival. (*Kent v. H. R. R. Co.*, 22 Barb., 278; Ang. on Car. [2d ed.], § 283; Story on Bailments, § 545 a; *Fenner v. B. and S. L. R. R. Co.*, 44 N. Y., 509; *Witbeck v. Holland*, 45 id., 13; *McDonald v. West. R. R. Co.*, 34 id., 501; *Rowland v. Miln*, 2 Hilt., 150; *Fisk v. Newton*, 1

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Den., 47; *Zinn v. N. J. Stmbt. Co.*, 49 N. Y., 445.) Defendant's mistake, in the name of the consignee, did not excuse its negligence. (*Read v. Spaulding*, 30 N. Y., 630, 645; 3 Bosw., 395, 408; *Caldwell v. N. J. Stmbt. Co.*, 47 N. Y., 282.) The measure of damages was the difference in the value of the cotton at the time and place it should have been delivered, and at the time of the actual delivery. (*Ward v. N. Y. C. R. R. Co.*, 47 N. Y., 29; *Zinn v. N. J. Stmbt. Co.*, 49 id., 445; *Griffin v. Colver*, 16 id., 489; 22 Barb., 293; Redf. on Railways, chap. 26, § 167; Sedgw. Meas. of Dam., 372.) The concurrent acts of plaintiffs and defendant could not contribute to the same injury. (*Zinn v. N. J. Stmbt. Co.*, 49 N. Y., 446.)

EARL, J. The cotton was shipped from Cairo, consigned to "Byron Sherman, 41 Warren street, New York." The thirteen bales were all marked with the capital letters, "F. B.," in a diamond figure; and these marks as well as the direction to the consignees were upon the shipping bill issued at Cairo, and forwarded to and received by the plaintiffs in due course of mail. The cotton reached Albany by the New York Central railroad, and by its agents was delivered to the defendant to be transported to New York and delivered to the consignees. Upon delivering to the defendant, the agents of the New York Central Railroad Company delivered with the cotton a freight bill containing the back charges on the same, the number of bales and the marks upon the bales, in which the consignee's name was mentioned as "Ryan" Sherman instead of "Byron" Sherman. This freight bill gave the only information the defendants received as to the destination and consignee of the cotton. The cotton was immediately transported to New York, and reached there on the 14th day of December, 1864. The defendant changed the name of the consignee to Ryan & Sherman, and in that name made its entries and made out its bills. Not finding these supposed consignees, it kept the cotton until December twenty-first, when it stored the same, for the supposed consignees, with

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Mulligan & Dudley, warehousemen. The consequence was that plaintiffs did not find or receive the cotton until February sixth. In the mean time there had been a large decline in the price of cotton, and this action was brought to recover damages, for the delay in delivering the cotton, suffered by the decline in the price thereof.

It is the duty of a carrier to transport goods committed to him in a reasonable time, and if from mere negligence or a plain violation of duty he omits to transport them beyond a reasonable time, and their market value falls in the mean time, the true rule of damages is the difference in their value at the time and place they ought to have been delivered and the time of their actual delivery. (*Ward v. The New York Central Railroad Co.*, 47 N. Y., 29.) It is not only his duty thus to transport the goods, but he has not performed his contract as carrier until he has delivered or offered to deliver them to the consignee, or done what the law esteems equivalent to delivery. When the consignee is unknown to the carrier a due effort to find him and notify him of the arrival of the goods is a condition precedent to the right to warehouse them; and if a reasonable and diligent effort is not made, the carrier is liable for the consequences of the neglect. If, in the mean time, the goods depreciate in value, the rule of damages is as above stated. (*Zinn v. The New Jersey Steamboat Co.*, 49 N. Y., 442.) If plaintiffs' case comes within these rules and no rule of law was violated upon the trial, the recovery was right and must be upheld.

The appellant alleges several grounds of error which we will proceed to examine separately:

1. The referee does not expressly find, as matter of fact, that the defendant was guilty of negligence — that is, there is not such a finding among the findings of fact. But among the conclusions of law there is a finding that the defendant was guilty of negligence, and if an express finding of fact that the defendant was thus guilty were necessary to uphold this judgment, this would be deemed sufficient. A finding of negligence is, generally, an inference from many facts — from

all the evidence in the case; and when it is found in the report of a referee, no matter where it is placed, it must be deemed his inference from all the evidence submitted to him upon the question. Besides, the facts found here warrant the finding of negligence, and would justify no other conclusion. The agents of defendant were clearly misled by their own mistakes in changing the name of the consignees to Ryan & Sherman and inquiring only for them. If they had retained the name of Ryan Sherman as consignee they would probably have found Byron Sherman. But there was no excuse for not delivering the cotton to Byron Sherman when he called for it; he called about the time of the arrival of the cotton, and several times during the months of December and January, at the general freight office, and had with him the bill of lading forwarded to him by mail, which contained his name as consignee, the true number of bales with the marks on them, and exhibited it to defendant's agents in charge of such office and inquired for his cotton and could obtain no information about it. The probabilities are very strong that but for the mistake of changing the name of the consignee to Ryan & Sherman, the discovery would have been made, when Byron Sherman first called, that he was the consignee. The referee was, therefore, fully justified in finding that the delay in the delivery of the cotton was caused by the negligence of the defendant.

2. It is claimed that the mistake of the New York Central Railroad Company, in giving to the defendant the name of Ryan Sherman as consignee, caused the mistake of defendant, or contributed to that mistake, and that plaintiffs cannot, therefore, recover, as the former company was their agent for the delivery of the cotton to the defendant. An answer to this claim is, that there is no such finding; the referee based his final conclusion of law upon the negligence of defendant, and the evidence tended strongly, if not irresistibly, to show that plaintiffs' damage was caused solely by its negligence.

In the case of transportation of property over several railroads constituting a continuous line, none of the roads can

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Opinion of the Court, per EARL, J.

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be said to be agents of the owner ; each is exercising an independent employment, and is a contractor with the owner, the contract being either express or such as the law implies ; each is responsible for its own negligence ; and, while the owner may lose by the negligence of either, he can in no proper sense be made responsible for such negligence. In this case the defendant could only be made responsible for the damage caused by its own negligence ; and such was the decision of the referee.

3. It is claimed that the referee allowed too much damage. The proof showed that this cotton was worth, per pound, on the day of its arrival, December fourteenth, one dollar and thirty-three cents ; December seventeenth, one dollar twenty-eight cents ; December twenty-first, the day the cotton was warehoused, one dollar twenty-five cents, and February sixth, the day of its delivery, eighty-two cents. The referee allowed plaintiff fifty cents per pound in making up the amount of damage awarded ; this was a liberal allowance, as defendant should have been allowed a reasonable time for delivery, and the damage should have been computed from the lapse of such time. But before judgment the plaintiffs deducted from their recovery the sum of \$745.54 ; and after such deduction their recovery was only at the rate of forty-two cents per pound ; and such a recovery was fully warranted by the evidence. In this respect, therefore, the defendant has no reason now to complain.

The judgment must, therefore, be affirmed, with costs.

All concur. ALLEN, J., not sitting.

Judgment affirmed.

## Statement of case.

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| 124 | 504 |
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| 139 | 44  |

## HENRY C. HOWARD et al., Respondents, v. GEORGE C. Moot, Appellant.

Rules of evidence are at all times subject to modification and control by the legislature, and changes thus made may be made applicable to existing causes of action.

An act declaring any circumstance or any evidence, however slight, *prima facie* proof of a fact is valid.

Accordingly *held*, that the act to perpetuate certain testimony respecting the title to the Pulteney estate (chap. 19, Laws of 1821), was constitutional and valid.

Also *held*, that the legislature having thereby made the chancellor the final arbiter to determine what would be good *prima facie* evidence of the facts stated, evidence taken in due form, as prescribed by the act, accompanied by the opinion of the chancellor, properly given and certified, to the effect that it was good *prima facie* evidence of the facts stated was, although the evidence was hearsay, competent and conclusive in the absence of any evidence to controvert it.

A will regularly admitted to probate can only be impeached for incapacity of the testator by reason of nonage or imbecility; competency will be presumed until the contrary is shown.

A devise to alien trustees of lands held by an alien under the act of 1798, "to enable aliens to purchase and hold real estate within this State," etc. (chap. 72, Laws of 1798), is valid.

This court will take judicial notice of the fact that the tract of land known as the "Pulteney estate" was ceded by the State of New York to the State of Massachusetts by the treaty and deed of cession executed December 16, 1786, and that under the proper authority, State and national, the Indian title to said lands has been extinguished.

As to whether the fact that the Indian right of occupation of lands within this State had not been extinguished with the sanction of the State government or abandoned by the Indians, can be set up by one without title, as against the owner in fee subject to such rights, *quære*.

All the terms and conditions of the said treaty, upon which depended the right of Massachusetts and her grantees to an absolute and indefeasible estate in the lands granted, *held*, to have been substantially performed.

(Argued February 10, 1876; decided February 22, 1876.)

· APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, affirming judgment in favor of plaintiffs, entered upon a verdict. (Reported below 2 Hun, 475; 5 T. & C., 427.)

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Statement of case.

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This was an action of ejectment to recover possession of 100 acres of land in Livingston county, part of the "Pulteney estate" so called.

(For the general history of the title under which plaintiff claimed, see 3 Seld., 305; 41 N. Y., 397.)

Plaintiffs introduced in evidence an exemplification from the Court of Chancery of depositions taken in proceedings under the act to perpetuate testimony respecting the title to the Pulteney estate (chap. 19, Laws of 1821), for the purpose of proving the death of Sir William Pulteney, the descent of the land to his daughter Henrietta Laura Pulteney; also proving her death and the descent of the land to her cousin Sir John Lowther Johnstone, and also proving his death. Accompanying the deposition was an opinion and order of JAMES KENT, chancellor, to the effect "that the said depositions did, in the opinion of the chancellor, furnish good *prima facie* evidence of the facts therein set forth," and ordering that the interrogatories and depositions be filed, etc.

This was objected to by defendant's counsel on the grounds that the alleged facts were not established by the testimony offered; that the legislature had no power to pass a bill authorizing testimony to be taken *de bene esse* without giving an adverse party the right of cross-examination, and that the testimony was mere hearsay, and upon points where hearsay evidence was incompetent. The objections were overruled, and defendant's counsel duly excepted.

An exemplified copy of the will of Sir John Lowther Johnstone devising the lands to trustees on certain trusts, and authorizing them to convey title, was also offered in evidence. This was objected to upon the ground, 1st, that it did not appear that the testator was twenty-one years old when the will was executed; 2d, that by the laws of the State the testator could not devise or convey the land; 3d, that being an alien he could not devise such lands. The objections were overruled, and said counsel duly excepted.

At the close of the evidence defendant's counsel moved for a nonsuit, on the following grounds, among others:

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Statement of case.

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First. That it appeared by the deed of cession that the State of Massachusetts was required to extinguish the Indian title, which they had not done. Second. That it appeared by that deed that the State of Massachusetts might grant the pre-emption of the whole, or any part of the territory so situated, providing that no purchase by the native Indians by any such grant or grants should be valid, unless made in the presence of and approved by the superintendent appointed by the Commonwealth of Massachusetts, which had not been done. Third. That it did not appear that any treaty with the Indians was ever filed in the office of Secretary of State, as required by such deed of cession. Fourth. That it did not appear that any such treaty was ever ratified by the legislature of this State. Fifth. That it did not appear that the legislature of this State ever consented to the making of any such treaty, or that any was made. Sixth. That there was no proof of the confirmation by the State of Massachusetts, as required by the act of cession. \* \* \* Twelfth. That the conveyances proved by the plaintiff did not show a sale, devise or descent within the act of 1798, such act not having any relation whatever to a trust. Thirteenth. That thereby such trusts were void, because contrary to the laws of this State.

The motion for a nonsuit was denied, and the defendant's counsel duly excepted.

The court directed a verdict in favor of the plaintiffs, finding the title to the premises in the plaintiffs, and assessing the plaintiffs' damages, to which ruling and direction the defendant's counsel excepted. The jury rendered a verdict accordingly.

*Scott Lord* for the appellant. The legislature had no power to enact chapter 19, Laws of 1821, and the testimony taken under it was improperly received. (*People v. Suprs. Westchester*, 4 Barb., 64; *Benson v. Mayor, etc.*, 10 id., 223; *Powers v. Bergen*, 6 N. Y., 358; *Hartung v. People*, 26 id., 167; *Killam v. Killam*, 1 Am. L. Reg. [N. S.], 28, 29;



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*Bates v. Kimball*, 2 Chip., 89; *Wilkinson v. Leland*, 2 Pet., 627; Smith on Stat. and Con. Law, 236, 296, 534, § 372; Sedg. on Stat. and Con. Law, 156-159; *People v. Snyder*, 41 N. Y., 397; Const., 1777, §§ 13, 41; R. L., 1813, 47; 1 Greenlf. Ev., 494.) Hearsay evidence of pedigree or of death is only admissible when from great lapse of time, or for other sufficient cause, the law presumes that original or direct evidence is not attainable. (2 Phil. Ev. [4th Am. ed.], 238; 1 id., 194, 197; C. & H. Notes, 612; *Higman v. Ridgeway*, 10 East, 120, 129; *Jackson v. Browner*, 18 J. R., 39; *Leggett v. Boyd*, 3 Wend., 379; *Caujolle v. Ferrie*, 26 Barb., 177; 1 Greenlf. Ev., § 124; *Stein v. Bowman*, 13 Pet., 220; *Mima Queen v. Hepburn*, 7 Cranch, 290; *Jackson v. Etz*, 5 Cow., 319; *Fosgate v. Her. M. and H. Co.*, 12 Barb., 352, 353, 358; *Duke of C. v. Graves*, 9 id., 596.) The objections to the deed from Charles H. Pierpont to the Duke of Cumberland were well taken. (*Thompson v. Ketchum*, 8 J. R., 189; *Frances v. Ocean Ins. Co.*, 6 Cow., 404, 429; *Lincoln v. Battell*, 6 Wend., 475; *Monroe v. Douglas*, 5 N. Y., 447.) The Indian title not having been extinguished, plaintiffs proved no right to recover. (*St. Regis Indians v. Drum*, 19 J. R., 127; *Goodsell v. Jackson*, 20 id., 693; *Lee v. Glover*, 8 Cow., 189; *Ogden v. Lee*, 6 Hill, 546; 5 Den., 628; *Wadsworth v. Buff. H. A.*, 15 Barb., 83; *Strong v. Waterman*, 1 Paige, 607; *Blacksmith v. Fellows*, 7 N. Y., 401; *People v. Dibbell*, 16 id., 203.)

*William Rumsey* for the respondents. The legislature has absolute control of the rules of evidence so far as that it may change the rules of presumption, and the burden of proof. (*Hand v. Ballou*, 12 N. Y., 541; *Ogden v. Saunders*, 12 Wheat., 213, 262, 349; *People v. Mitchell*, 45 Barb., 208; *Hickox v. Tallman*, 38 id., 608; *Comm. v. Williams*, 6 Gray, 1-5; *Delaplaine v. Cook*, 7 Wis., 54.) The depositions taken under chapter 19, Laws of 1821, were proper evidence, and the law was within the power of the legislature. (*Graves v. Duke of C.*, 9 Barb., 595; 7 N. Y., 305; *People v. Snyder*,

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51 Barb., 589; 41 N. Y., 397; Cooley's Const. Lim., 87, 88, 367, 368; Story on Const., § 534; 1 Webster's Laws, 17, art. 41.) The will of Sir John Lowther Johnstone was properly received in evidence. (1 Webster's Laws, 178, 179, §§ 2, 7, 9; 1 R. L., 364, 365, §§ 2, 6, 7, 9.) The deed from Pierpont to the Duke of Cumberland was properly received in evidence. (Laws of 1816, chap. 118, 119; 3 R. S. [1st ed.], app., 36; 3 Seld., 305, 314; 9 Barb., 595; *Hoyt v. Martense*, 16 N. Y., 281, 233; *Baker v. Lorillard*, 4 id., 257, 261; *Rex v. Wheatley*, 2 Burr., 1128; 1 Kent's Com., 475, 476; *Goodell v. Jackson*, 20 J. R., 722.) The original oath of allegiance was properly received in evidence. (1 Greenl. Ev., §§ 6, 144; *Ritchie v. Putnam*, 13 Wend., 524; *People v. Snyder*, 41 N. Y., 397, 403, 409; *Stark v. Ches. Ins. Co.*, 7 Cranch, 420; 51 Barb., 589; 2 Greenl. Laws, 99, 452.) The treaty of 1794 confirmed and protected Williamson's title and was properly in evidence. (8 U. S. Stat. at Large, 122, part 9; Const. U. S., art. 6, cl. 2; 1 Greenl. Ev., § 490; *Jackson v. Adams*, 7 Wend., 367; *Goodrich v. Russell*, 42 N. Y., 177; *Fairfax v. Hunter*, 7 Cranch, 603; *Sheaffe v. O'Neil*, 1 Mass., 256; *Jackson v. Clark*, 3 Wheat., 1; *Munro v. Merchant*, 28 N. Y., 9, 34; *Watson v. Donnelly*, 28 Barb., 653; *Orser v. Hoag*, 3 Hill, 79.) The Indians had no title to the land, but merely a right of occupancy without legal title. (3 Kent's Com., 378, 380; *Jackson v. Hudson*, 3 J. R., 375; *Fletcher v. Peck*, 6 Cranch, 87; *Johnson v. McIntosh*, 8 Wheat., 543; *Strong v. Waterman*, 11 Paige, 607; *U. S. v. Cook*, 19 Wall., 591; 41 N. Y., 397; *Swinnerton v. Col. Ins. Co.*, 37 id., 174; *Maghee v. C. and A. R. R. Co.*, 45 id., 514, 524; *Bk. of Augusta v. Earle*, 13 Pet., 590; 13 Wend., 524.) No statute was needed to enable the devisees of Sir John Lowther Johnstone to take the estate devised to them by his will. (7 Cranch, 603; 2 Kent's Com., 54, note e.; *People v. Conklin*, 2 Hill, 67; *Mick v. Mick*, 10 Wend., 379; *Goodrich v. Russell*, 42 N. Y., 177, 181.) The trusts in the will of Sir John Lowther Johnstone are not void as contrary to the laws of this State. (1 R. S., 727, § 48; *Cushney v. Henry*, 4 Paige, 345, 352; *Duke of O.*

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Opinion of the Court, per ALLEN, J.

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v. *Graves*, 9 Barb., 595, 606 ; 7 N. Y., 305.) The deed of disposition of Sir John Lowther Johnstone not being properly exemplified was properly excluded. (2 R. S., 396, 397 ; 1 id., 759, § 17 ; Bouv. Inst., §§ 3096-3107 ; C. & H. Notes, 1244, note 874 ; *Richmond v. Patterson*, 3 Ohio, 368 ; 1 Greenl. Ev., § 484.)

ALLEN, J. The plaintiffs bring their action to recover the possession of a parcel of land in the county of Livingston, in the possession of the defendant, to which they make title through several mesne conveyances from the State of Massachusetts. The lands in controversy are a part of the tract ceded to that State by the treaty and deed of cession between it and the State of New York, made on the 16th day of December, 1786. The title of the plaintiffs rests mainly upon documentary evidence, and has been very frequently before the courts of this State, and been sustained hitherto against the objections taken to it by astute counsel. Having been so often subjected to the test of judicial scrutiny, we should not expect to discover at this day any very flagrant defects in it. The defence of this action is sought to be upheld, not by affirmative proof of right in the defendant, or of title out of the plaintiffs, but by technical objections to the documentary and other evidence offered by the plaintiffs, which seem not to have been noticed in former litigations involving the same title. It is a circumstance worthy of notice that the objections now taken might have been taken, and were as patent in former contestations as they now are, but were either overlooked by counsel or disregarded by the courts. Still, if valid, they must have effect, although discovered late.

It will not be necessary to do more than to consider the objections urged upon this appeal. The general history and chain of the title will be found in several of the reported cases in this State. (*Duke of Cumberland v. Graves*, 9 Barb., 595 ; S. C., 3 Seld., 305 ; *People v. Snyder*, 51 Barb., 589 ; S. C., 41 N. Y., 397.) The first exception and objec-

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tion is to evidence taken pursuant to the act to perpetuate certain testimony respecting the title to the Pulteney estate, passed in 1821. (Laws of 1821, chap. 19.) The act authorized the perpetuation of testimony under the direction of the Court of Chancery, and made the same *prima facie* evidence of the facts set forth in the examination of the witnesses, if the chancellor should be of opinion that the depositions furnished good *prima facie* evidence of such facts. It is not objected that the depositions offered and read in evidence were not taken in due form, or that the opinion of the chancellor was not properly certified and given, to make the depositions evidence, if the same were competent in other respects.

But two objections were taken to this evidence upon the trial: First, that the legislature had no power to authorize the testimony to be taken *de bene esse* without giving any adverse party the right of cross-examination; and, secondly, that the testimony as given in the deposition was mere hearsay, and upon points upon which hearsay evidence was incompetent. While the legislature cannot take from parties vested rights without compensation, the remedies by which rights are to be enforced or defended are within the absolute control of that branch of the government. The rules of evidence are not an exception to the doctrine that all rules and regulations affecting remedies are, at all times, subject to modification and control by the legislature. The changes which are enacted from time to time may be made applicable to existing causes of action, as the law thus changed would only prescribe the rule for future controversies. It may be conceded, for all the purposes of this appeal, that a law that should make evidence conclusive which was not so necessarily in and of itself, and thus preclude the adverse party from showing the truth, would be void, as indirectly working a confiscation of property, or a destruction of vested rights. But such is not the effect of declaring any circumstance or any evidence, however slight, *prima facie* proof of a fact to be established, leaving the adverse party at liberty to rebut

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and overcome it by contradictory and better evidence. That this may be done is well settled by authority. (*Hand v. Ballou*, 2 Kern., 541; *Hickox v. Tallman*, 38 Barb., 608; *Commonwealth v. Williams*, 6 Gray, 1; Cooley's Const. Lim., 367, and cases cited.) The act of 1821 was not in excess of the legislative power.

The objection that the testimony taken under it was hearsay is not tenable. It was not all hearsay. Some of the facts stated by the witnesses were within their own knowledge. But if it were otherwise, the legislature made the chancellor the final arbiter to determine what should be good *prima facie* evidence of the facts stated; and such evidence, whether resting wholly upon hearsay or otherwise, is, under the act and within the authorities cited, conclusive in the absence of any evidence to controvert it or suggestion that it is untrue or mistaken. Perhaps some of the facts stated were susceptible of better proof, and the evidence might not have been admissible under the application of strict rules upon the trial; but upon reading the whole evidence, there was clearly sufficient to justify the chancellor in certifying that it was good *prima facie* evidence of the facts stated, those facts relating to the death of some parties and the succession and inheritance by the claimants of the large tract of land of which the *locus in quo* is a part. If, however, the evidence was slight and unsatisfactory, it would have been more easy to meet and overcome it before the jury. It is enough that it was competent; its effect was for the jury.

There is no force in the objection taken at the argument, that the chancellor merely certified that the depositions were *prima facie* evidence that the witnesses had heard and believed as they stated. To give it that interpretation would be trifling with a solemn judicial act. The certificate related to the facts which the statements tended to prove, and to prove which the depositions were taken, and to perpetuate the proof of which the act was passed.

The next objection is to the will of Sir John Lowther Johnstone, upon the grounds: First, that it did not appear that

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Opinion of the Court, per ALLEN, J.

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the testator was twenty-one years old when the will was executed; secondly, that by the laws of the State he could not convey or devise the lands; and third, that being an alien he was incapable of making a devise of lands. The will having been regularly admitted to probate, and no objection being taken to the proof or the exemplification of the record of such will and proof as produced and given in evidence, it could only be impeached for incapacity of the testator, either by reason of nonage or imbecility, by direct proof of the facts alleged. Competency to execute an instrument thus solemnly proved will be presumed, until the contrary is shown. The right of Sir John Lowther Johnstone, notwithstanding his alienage, to devise lands within this State is clearly established by the judgment of this court in *The Duke of Cumberland v. Graves* (*supra*). This right was secured by the act of April 2, 1798, authorizing aliens to take and hold real property within the State, to them, their heirs and assigns, forever.

The objection to the deed from Charles H. Pierpont to the Duke of Cumberland and others, upon the ground that it was unauthorized by the act of 1798, and that there was no competent proof of its execution, was properly overruled.

The point urged upon the hearing in this court, that there was no authority proved in Jonathan Brundrett to execute in behalf of the Duke of Cumberland, was not taken at the trial, and if it had been taken would not have applied, as it was another deed, to which no objection was taken, that was executed by Mr. Brundrett; and no defect in the proof to the deed from Pierpont to the Duke of Cumberland is suggested.

Several objections were urged at the close of the trial to the right of the plaintiffs to maintain the action, all of which had respect to defects in the title of the State of Massachusetts, by reason of a failure to extinguish the Indian title and to comply with other conditions of the compact between the two States. Whether the fact that the Indian right of occupation, which was the extent of the right of the Indian

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tribes to lands within the State, had not been extinguished with the sanction of the State government or abandoned by the Indians themselves, could be set up by one without title against the owner in fee, subject to the rights of the Indians and with the right of pre-emption from them, is questionable. The title of the Indians to the soil is founded upon simple occupancy, and they have no power to dispose of the soil except to the government, or one who has acquired from the government the right of pre-emption. (3 Kent's Com., 79, 80; *Strong v. Waterman*, 11 Paige, 607; *Goodell v. Jackson*, 20 J. R., 693; *Johnson's Lessee v. Mackintosh*, 8 Wheaton, 543; *United States v. Cook*, 19 Wal., 591.) In the case last quoted Chief Justice WARRE says: "The possession, when abandoned by the Indians, attaches itself to the fee without further grant." (See *Jackson v. Hudson*, 3 J. R., 375.) But this court held in *The People v. Snyder* (*supra*), that this court will take judicial notice that the tract of land of which the premises in dispute are a part, was ceded to the State of Massachusetts, and that under the proper authority of both States and of the nation the Indian title has been extinguished.

Courts will take notice of whatever ought to be generally known within the limits of their jurisdiction. The history of the Six Nations of Indians is a part of the history of the State, of which the courts will take notice. (1 Greenleaf's Ev., § 6.) It is a matter of notoriety that but few of the Indians that once were the occupants of the lands within the State are now dwellers within its boundaries, and their residence and occupation are restricted to a few well-known and legally established reservations of limited extent, set apart for their use. The statute books of the State need only be referred to to learn the extent of the present Indian occupancy. In addition to this presumption, the plaintiffs have produced, upon the argument of this appeal, authentic documentary evidence of the extinction of the Indian title.

Without considering in detail the several propositions urged by the learned counsel for the appellant, in impeach-



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ment of the title of the State of Massachusetts and her grantees, and the proceedings to perfect it under the treaty, it is sufficient to say that upon a careful examination it appears that all the terms and conditions of the treaty, upon which depended the right of Massachusetts and her grantees to an absolute and indefeasible estate in the lands granted, have been substantially performed. The title has been recognized by the different departments of the State government, and its validity frequently affirmed by the courts; and it should not be overthrown at this late day upon slight or technical grounds, if any such exist. I have discovered no defects in the title.

The judgment must be affirmed.

All concur; FOLGER, J., not voting.

Judgment affirmed.

JAMES WOLSTENHOLME et al., Appellants, v. THE WOLSTENHOLME FILE MANUFACTURING COMPANY, Respondent.

In an action to recover damages for breach of contract, where plaintiff has recovered judgment allowing one item of damage claimed and rejecting another, he cannot retain the amount allowed and ask upon appeal for a re-trial as to the item rejected; if a reversal and new trial is granted, it must be of the entire judgment and claim.

(Argued February 11, 1876; decided February 22, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department affirming a judgment in favor of plaintiffs, entered upon the report of a referee. (Reported below, 4 Hun, 427.)

This action was brought to recover damages for an alleged breach of contract made by defendant with plaintiffs, by which defendant agreed to pay plaintiff (James Wolstenholme) a certain salary and certain dividends of stock as compensation for his services as superintendent of defendant.

The referee found that plaintiffs, with the exception of Thomas J. Sizer, were entitled to recover the salary, but not

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the dividends, and that defendant was entitled to judgment as against plaintiff Sizer.

Both parties appealed to the General Term and to this court. The plaintiffs appealed to this court from the judgment of affirmance in so far as it affirms that part of the judgment below, which adjudged that plaintiffs were not entitled to dividends, and from so much thereof as was in favor of defendant against plaintiff Sizer.

*Benj. H. Austin* for the appellants. It was proper to affirm the judgment as to the salary and Wolstenholme's discharge, and reverse the holding as to the accounting. (Code, § 330; 1 Barb. Ch. Prac., 65, 397, 465; *Bagley v. Smith*, 10 N. Y., 489; *Story v. N. Y. C. and H. R. R. Co.*, 6 id., 85 89; *Prest., etc., D. and H. C. Co. v. Penn. Coal Co.*, 50 id., 250; *Struthers v. Pierce*, 51 id., 357, 365; *Van Bokkelin v. Ingersoll*, 5 Wend., 341; *Flower v. Allen*, 5 Cow., 663; *Shaw v. Davis*, 55 Barb., 389, 401, 402; *Ward v. Lee*, 50 id., 354; *Brownell v. Winnie*, 29 N. Y., 400-411; *Chouteau v. Suydam*, 21 id., 179-185; 2 id., 500-505; *Mapes v. Coffin*, 5 Paige, 296; *Cuyler v. Moreland*, 6 id., 273-275; *Horn v. Van Schaick*, 7 id., 221; *Clowes v. Dickinson*, 8 Cow., 328; *Staats v. H. R. R. Co.*, 23 How., 463.)

*E. C. Sprague* for the respondent. If a new trial is granted the judgment must be reversed and a new trial granted *in toto*. (*Maffat v. Sackett*, 18 N. Y., 522; *Story v. N. Y. C. and H. R. R. Co.*, 2 Seld., 85; *Del. and Hud. C. Co. v. Penn. Coal Co.*, 50 N. Y., 250-255.)

MILLER, J. There is no authority for the practice, that in an action at law on an account or for damages, that an appellate court can affirm a judgment allowing one item of a claim interposed, and send it back for a new trial as to another. The error alleged as to a part, necessarily reverses the entire judgment, and the reversal and new trial must be as to the entire claim.

None of the authorities relied upon uphold the doctrine

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contended for in a case like this. In equity cases appeals may be taken from part of a decree, and a reversal or variation asked in accordance with the claim of the party who seeks relief. So, also, judgments which are for too large an amount may be reduced as to a portion and affirmed as to the residue thereof, upon conditions to be stated. But there is no rule by which, in an action at law, the party who has obtained a judgment can retain the amount and ask for a re-trial as to one of the claims which he has made and which has been rejected. Such a practice would render every case embracing a number of items or claims open for a reversal in part and for a new trial as to the residue, and cannot be upheld. So far then as the appeal by the plaintiffs is concerned, it cannot be sustained without reversing the entire judgment.

No exception can be made in favor of Sizer, one of the plaintiffs, who has an interest in an undivided portion of the claim, which has been rejected; and this same result would follow a reversal of the judgment as to him as would if reversed as to the other plaintiffs. The counsel for the defendant does not ask for a reversal of the judgment from which the defendant has appealed unless the same is reversed and a new trial granted, in accordance with the plaintiffs' appeal; and, as the case stands, the judgment should be affirmed, without costs of appeal to either party.

All concur.

Judgment affirmed.

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THE ALEXANDER PRESBYTERIAN CHURCH, Appellant, v. THE PRESBYTERIAN CHURCH, CORNER FIFTH AVENUE AND NINETEENTH STREET, NEW YORK CITY, Respondent.

Defendant, a religious corporation, organized under the general act of 1813 (chap. 60, Laws of 1813), purchased a lot, which was conveyed to it, and erected buildings thereon for a mission church and school. The persons then attending service were, with defendant's consent, incorporated. Defendant thereafter leased to the new corporation (plaintiff)

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the portion of the building used for a church, defendant still maintaining the mission school. Plaintiff's lease having expired, defendant refused to renew it. In an action brought to establish an interest in the property in plaintiff and to restrain defendant from using or interfering with plaintiff's use of the premises, *held*, that plaintiff had no title to or interest in the property, and could not recover. Also, *held*, that the act of 1850 (chap. 122, Laws of 1850), if applicable, did not aid plaintiff, as it did not divest defendant of its property, but gave authority to purchase and to hold.

To bring a case within the provision of said act (§ 4), authorizing a corporation organized under it to take into its possession and control real or personal estate, the property must have been given, granted or devised to it or to some person for its use.

(Argued February 14, 1876; decided February 22, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of defendant, entered upon a decision of the court at Special Term.

This action was brought by plaintiff to establish an alleged trust in its behalf in certain real estate, and to restrain defendant from the use and occupancy, and from interfering with plaintiff's use and occupancy.

The facts found by the court are substantially these: Plaintiff, a religious incorporation organized under the general law providing for the incorporation of religious societies, purchased certain lots in New York, which were conveyed to it in 1854, and erected a building thereon for the purpose of establishing and maintaining a mission church and school. The lots and buildings were paid for by contributions of members of defendant's society. A preacher was employed, and services and Sabbath school kept up by defendant until 1865, when the persons statedly attending service there were incorporated, with defendant's consent, the corporation being plaintiff herein; that plaintiff thereafter occupied a portion of the building under a lease from defendant at a nominal rent, defendant still continuing and maintaining the mission school. The members of plaintiff's church were, prior to its incorporation, members of defendant's church. The last lease

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Opinion of the Court, per *Curiam*.

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to plaintiff expired in 1872, prior to which time notice was given to plaintiff that the lease would not be renewed

*Ch. P. Shaw* for the appellant. Plaintiff could maintain this action: (Laws 1813, chap. 60, §§ 3, 4; Laws 1850, chap. 122, § 2; *Rector, etc., v. Crawford*, 43 N. Y., 476.) The title to the premises in question was vested in defendant as a trust for the use and benefit of plaintiff. (*Gran v. The Prussia, etc.*, 36 N. Y., 161; 43 id., 476.) Plaintiff was not estopped by the leases from defendant. (*Jackson v. Spear*, 7 Wend., 401; *Childs v. Chappel*, 9 N. Y., 246; *Smith v. Babcock*, 36 id., 168.)

*S. P. Nash* for the respondent. Money given to a religious society and paid over to its officers is not considered as establishing a trust which the courts of this State will enforce. (*Voorhies v. Presb. Ch.*, 17 Barb., 103; *Wheaton v. Gates*, 18 N. Y., 395; *Petty v. Tooker*, 21 id., 267; *Mad. Ave. B. Ch. v. Bap. Ch. in O. St.*, 46 id., 131, 135.)

*Per Curiam*. The parties hereto are religious corporations, formed under the act "to provide for the incorporation of religious societies," passed April 3, 1813. The plaintiff claims title to the property in question, under section 4 of that act, which provides that the trustees of every church, congregation or society, organized under the act are authorized "to take into their possession and custody all the temporalities belonging to such church, congregation or society, whether the same consist of real or personal estate, and whether the same shall have been given, granted or devised directly to such church, congregation or society, or to any other person for their use;" and also, to receive, hold and enjoy all churches and estates "belonging to such church, congregation or society in whatsoever manner the same may have been acquired or in whose name soever the same may be held, as fully and amply as if the right or title thereto had originally been vested in the said trustees."

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Opinion of the Court, per *Curiam*.

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The difficulty with plaintiff's case is, that there are no facts upon which it can base its claim. To bring a case within that section the property must have been given or granted to the society, or for its use; and then, upon its incorporation, its trustees may take possession and control of it. Here, the funds with which the real estate was purchased, and the edifice erected, were contributed by the members of the defendant's congregation, for its use and benefit, before the congregation which subsequently organized, the plaintiff, had any existence. The funds were intended to be used by the defendant in establishing and maintaining a mission church and school; but there was no intention on the part of the donors that the property should vest in the persons connected with the mission church and school, or that they should in any way control it.

The act passed in 1850 (chap. 122) does not aid the plaintiff, even if it be assumed to be applicable to this case. Upon that assumption the defendant had authority under that act to purchase the site, build the church, and forever thereafter hold and manage the property. There is nothing in the act which in any way divests the defendant of its property. And the fact that defendant consented to plaintiff's incorporation can make no difference. Such consent did not divest it of the property and vest it in the plaintiff. It could consent upon such terms as it saw fit. It is clear that it did not intend to vest the property in the plaintiff, as it retained possession and control of a portion thereof, and simply permitted the plaintiff to use and occupy the balance under a lease.

We are, therefore, of opinion that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

## Statement of case.

JOSIAH S. SMITH et al., Appellants, v. JACOB VAN OSTRAND,  
Respondent.

A remainder may be limited upon a bequest of money as well as of other personal property, and the testator may confide the money to a legatee for life, trusting to such legatee to preserve the fund for the benefit of the remainderman; in which case the legatee for life becomes trustee of the principal during the continuance of the life estate.

The will of S. bequeathed to his wife the sum of \$1,650, in lieu of dower, for her support during her natural life or so long as she should remain his widow, then "her said dower" to be transferred to testator's three children, fifty dollars of said sum to be paid to the widow as soon as practicable after the testator's decease, and the residue in about six months thereafter. *Held*, that the bequest gave to the widow of S. the use of the \$1,650 during her life or widowhood, with power to apply so much of the principal as might be necessary for her support, but with no further power of disposition; and, subject to the exercise of this power, gave a remainder in the principal to the children; that this remainder was not repugnant to the prior gift and was valid; and that upon the death of the widow, the children were entitled to so much of the fund as remained undisposed of for her support.

*Patterson v. Ellis* (11 Wend., 259) distinguished.

Upon the death of S., his widow received from the executors the money bequeathed, and with it bought United States bonds, which she held at the time of her death. *Held*, that the children of S., not his executors, were entitled to the bonds and were the proper parties to bring an action for their conversion; that the executors having paid over the money as required by the will, were discharged from all liability and divested of all power concerning it.

*Lysen v. Blake* (22 N. Y., 558) distinguished; *Smith v. Van Ostrand* (3 Hun, 450; 5 T. & C., 664), reversed.

(Argued February 17, 1876; decided February 25, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, in favor of defendant, entered upon an order denying plaintiffs' motion for a new trial, and directing judgment upon an order dismissing plaintiffs' complaint, granted on trial. (Reported below, 3 Hun, 450; 5 T. & C., 664.)

This action was brought for the conversion of certain United States bonds.

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Statement of case.

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The complaint alleged in substance, that Garret I. Smith, late of the county of Seneca, died on or about January 1, 1864, leaving a last will and testament which contained this clause: "First, ~~Give and bequeath unto my beloved wife Catharine, the sum of one thousand six hundred and fifty dollars, in lieu of dower on my real estate, for her support during her natural life, or as long as she remains my widow,~~ then her said dower shall be transferred to my three children hereinafter mentioned. Fifty dollars of the above named sum shall be paid her as soon as practicable after my decease, and the remainder on or about six months after. Also, I further ~~Give~~ her any part of the household furniture that she wishes for her own use and that she may will to whom she chooses, and I further provide that she may occupy our dwelling-house six months after my decease, and necessary provisions for her support and comfort, which shall be provided out of my estate." That plaintiffs are the three children of the testator mentioned and referred to. That his wife Catharine survived the testator and obtained possession of said money mentioned in said will, and bought United States bonds of the value of about \$1,500, with the money aforesaid, and held said bonds up to and at the time of her decease, using only for herself the coupons or interest thereof. That sometime before or after the decease of said Catharine, the defendant became the custodian of said bonds without value, and merely as the friend or agent of said Catharine, the widow as aforesaid. That shortly after the death of said Catharine, which occurred October 15, 1869, plaintiffs demanded the bonds of defendant who refused to deliver up the same

*N. A. Halbert* for the appellants. A life estate can be created and a remainder limited, on a bequest of money as well as of other personal property. (*Richards v. Richards*, 9 Price, 225; *Dayton on Surr.* [3d ed.], 418, 419; 4 Kent's Com. [5th ed.], 268; *Rapalye v. Rapalye*, 27 Barb., 615; *Spear v. Tinkham*, 2 Barb. Ch., 215; *Covenhoven v. Shuler*, 2 Paige, 132; 2 Kent's Com. [5th ed.], 352; *Burleigh v.*

## Opinion of the Court, per RAPALLO, J.

*Clough*, 52 N. H., 257; 13 Am. R., 41; *Smith v. Bell*, 10 Curt., 34; 6 Pet., 80; *Gillespie v. Miller*, 5 J. Ch., 20; *Field v. Hitchcock*, 17 Pick., 182; *Porter v. Tournay*, 3 Ves., 310; *Russell v. Russell*, 3 Meriv., 94-195.) A bequest of money for life is only a gift of its use. (2 Kent's Com., 352; 2 Wash. on R. P. [3d ed.], 673; 2 Redf. on Wills, 272, note; *Field v. Hitchcock*, 17 Pick., 183; *Norris v. Beyea*, 13 N. Y., 273.) The widow's interest under the will was only a life estate. (*Hatfield v. Sneden*, 42 Barb., 621; *Trustees Aub. Sem. v. Kellogg*, 16 N. Y., 83; *Woodhouse v. Maverack*, 2 Liv. L. Mag., 457; *Pinkey v. Pinkey*, 1 Bradf., 269-271; *Tyson v. Blake*, 22 N. Y., 558; *Bell v. Smith*, 10 Curt., 29.) If the widow had a right to use the capital plaintiffs were still entitled to recover. (*Rathbone v. Dyckman*, 3 Paige, 26; *Rindge v. Baker*, 57 N. Y., 225; 1 R. S. [Edm. ed.], 674, § 32; 727, § 2; T. & B. Law of Trusts and Trustees, 818; *Bell v. Warn*, 4 Hun, 406; *Taggart v. Murray*, 53 N. Y., 233; *Terry v. Wiggins*, 47 id., 512; *Burleigh v. Clough*, 13 Am. R., 23; *Ruby v. Barnett*, 12 Mo., 3; *Surnaw v. Surnaw*, 5 Mad., 123; *Upwill v. Halfey*, 1 P. Wms., 651; 2 Wash. on R. P. [3d ed.], 673, § 10.) The action was properly brought by plaintiffs. (Code, § 111, 148; 1 P. Wins., 651; 2 Kent's Com., 202; *Savage v. Corn Ex. Ins. Co.*, 4 Bosw., 2.)

*S. R. Ten Eyck* for the respondent. The bequest to the widow was absolute and unconditional. (*Pitts v. Hill*, 4 Barb., 419; *Patterson v. Ellis*, 11 Wend., 259.) She had a right to spend and consume the legacy. (*Tyson v. Blake*, 22 N. Y., 363; *Norris v. Beyea*, 3 Kern., 286.)

RAPALLO, J. On the trial of this action no evidence was introduced except the will of Garret I. Smith. After the reading of the will in evidence, the court dismissed the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action; the averments of the complaint, as to matters dehors the will, must, therefore, for



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the purposes of the present appeal, be taken as true, and no reference to the answer is necessary or proper.

The complaint avers that Catharine, the widow of the testator, survived him, and obtained possession of the money mentioned in the will, and with such money bought United States bonds of the value of about \$1,500, and held said bonds up to and at the time of her decease, using for herself only the coupons or interest thereof; that she died about the 15th of October, 1869; that some time before or after her decease the defendant became the custodian of said bonds without value, and merely as the friend or agent of said widow; that after her death the plaintiffs notified the defendant that the said bonds were their property under the will, and demanded them of the defendant, but he refused to deliver them.

The only question before us is whether, on these facts, the plaintiffs were entitled to the bonds on the death of the widow. The solution of this question depends upon the construction of the will; if by the will, the money bequeathed to the widow became her absolute property, and no valid remainder was limited upon the bequest to her, then the complaint was properly dismissed; if the bequest was not absolute, and a valid remainder to the plaintiffs was created by the will, then two questions only remain to be considered: First, did the title to the bonds in which the money was invested pass to the remaindermen on the death of the widow; and, secondly, are they the proper parties to bring the action, or should it have been brought by the executors of Garret I. Smith?

The first question is as to the construction of the will. That a remainder may be limited upon a bequest of personal property, is unquestionable, and it is equally clear that it may be limited upon a bequest of money as well as of other personal property. (2 Kent Com., 352, 353 [11th ed.], and cases cited; *Norris v. Beyea*, 13 N. Y., 273; 2 Washb. Real Pr., 673 [3d ed.].) When a life estate is bequeathed in a sum of money, with remainder over, the legatee is entitled only to the

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income, and the principal, subject to the life estate, belongs to the remainderman, and, unless otherwise directed by the will, it is the duty of the executor either to invest the money and pay the interest to the first legatee during life, and preserve the principal for the remainderman, or, on paying it over to the legatee, to require security from him for the protection of the remainderman in respect to the principal. (*Tyson v. Blake*, 22 N. Y., 558.) But it is within the power of the testator to dispense with these safeguards and to confide the money to the legatee for life, trusting to such legatee to preserve the fund for the benefit of the remainderman, in which case the legatee for life becomes trustee of the principal during the continuance of the life estate.

If the will should be construed as giving to the widow only a life estate in the fund, the case would be comparatively free from difficulty. But we are inclined to the opinion that he intended to give her something more than a mere life estate, though less than the absolute ownership or unconditional power of disposition of the fund. He bequeaths to her the sum of \$1,650, in lieu of dower in his real estate, for her support during her natural life, or as long as she remains his widow, then her said dower shall be transferred to his three children (the plaintiffs).

The *dower* he speaks of as transferable to his three children on her death or marriage must, we think, mean the sum of money which he had bequeathed in lieu of dower, as her dower, in the legal sense of the term, could not survive her, nor was it in his power to dispose of it. The will must then be read as if it had said that on the expiration of her life or widowhood the said sum of money should be transferred to his three children.

This provision, in connection with other provisions of the will, convinces us that it was not the intention of the testator to give the money absolutely to his wife, or to empower her to dispose of it, unless it be for her support. In a subsequent part of the same clause, he gives her any part of the household furniture that she wishes for her own use, and says that

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Opinion of the Court, per RAPALLO, J.

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she may will it to whom she chooses, showing that the idea was present to his mind what should become of his bequests to her after her death; and that as to the household furniture he intended to give her a power of testamentary disposition, which as to the money he withheld, and that he assumed himself to direct what should be done with that after her death, or in case she should marry again.

If there were nothing else in the will than what has been here referred to, I should be inclined to the opinion that the intention of the testator was to give to his widow only a life estate in the \$1,650, with remainder to his children; and I cannot see but that such a disposition might have been perfectly reasonable and proper. This depends upon the circumstances of the testator. If his real estate was worth only \$5,000, the income of one-third was all that she was entitled to as dower, and on her death this interest would cease. The income of \$1,650 during her life would in that case be a full equivalent for her right of dower. The bequest, it must be observed, is in lieu of dower, and is not the only provision made in the will for her support. She was still at liberty to claim her dower, but if she did so, she would have been obliged to relinquish this legacy. Whether or not the interest of \$1,650 was an adequate provision for her support cannot be determined without knowing the circumstances of the testator, and if determined, would throw little light on the interpretation of the will. If it were not for the provision next referred to, I should be inclined to the opinion that the intention of the testator would be best arrived at by transposing the words of the bequest so as to read, I give to my wife the sum of \$1,650, during her natural life, in lieu of dower, etc., for her support.

But from the subsequent provision, that fifty dollars of the said sum shall be paid her as soon as practicable after the decease of the testator, and the remainder on or about six months thereafter, I am led to the conclusion, that the testator intended to empower his widow to expend out of the principal of the fund what should be necessary for her

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Opinion of the Court, per RAPALLO, J.

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support. It is not reasonable to suppose, that this fifty dollars was to be paid to her for the purpose of investment, and the only alternative is to infer that it was to be used by her for her support. This characterizes the previous words "for her support during her natural life," and leads to the conclusion, that she was empowered to apply the principal so far as necessary to her support and that the bequest of the remainder to the children was subject to exercise of this power by the widow, and that they would be entitled only to what should remain over and above what she had used for the authorized purpose. If she was authorized to use this fifty dollars for that purpose, it must have been the testator's intention that she should, for the like purpose, have power to use any other part of the fund. It was all held under the same tenure.

The conclusion is, that the intent of the testator was, that his widow should have the use of this \$1,650 during her life or widowhood, with power to apply so much of the principal as might be necessary, to her support, but that no other power of disposition, testamentary or otherwise, was given to her, and that, subject to the exercise of the power given, a remainder in the principal was bequeathed to the children. This disposition, if valid, would entitle the plaintiffs to so much of the fund as on her death remained unexpended, for her support, and this portion of the fund she held in trust for them.

It is contended on the part of the respondent, that the gift of the remainder to the children is repugnant to the prior gift to the wife, and therefore, void, and in support of this proposition, the cases of *Patterson v. Ellis* (11 Wend., 259), *Hill v. Hill* (4 Barb., 419), *Tyson v. Blake* (22 N. Y., 558), *Norris v. Beyer* (3 Kern., 286) are cited.

These cases sustain the proposition, that where an absolute power of disposal is given to the first legatee a remainder over is void for repugnancy. In *Patterson v. Ellis*, the language of the will was this, that the fund should be at the "free and absolute disposal of his daughter after she should

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Opinion of the Court, per RAPALLO, J.

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attain the age of twenty-one." In the other cases cited the remainders were held valid, but they recognize the proposition, that if the power of disposition of the first taker is absolute, the remainder is repugnant. But they also recognize the principle, that if the *jus disponendi* is conditional the remainder is not repugnant. (*Hill v. Hill*, 4 Barb., 419.) The power of disposition, if any, in the present case, was only for a special purpose, viz., the support of the widow. If not required for that purpose, there was no power to appropriate the funds to any other.

The case of *Upwell v. Haley* (1 Peere Williams, 651) is precisely in point upon this question. There the testator bequeathed to his sister such part of his estate as his wife should leave of her subsistence. The court say: "It is now established that a personal thing or money may be devised to one for life, remainder over; and as to what has been insisted on, that the wife had a power over the capital or principal sum, that is true, provided it had been necessary for her subsistence, not otherwise." The remainder over was held good. To the same effect is *Surman v. Surman* (5 Madd., 123), *Terry v. Wiggins* (47 N. Y., 512), *Trustees, etc., v. Kellogg* (16 N. Y., 83).

I think, therefore, that reason and authority sustain the conclusion, that the remainder limited to the plaintiffs in the sum of \$1,650, or so much thereof as was not used by the widow for her support, during her life, was valid.

The only remaining questions are, whether, upon the averments of the complaint, the title to the bonds, in which the legacy was invested, passed to the remaindermen on the death of the widow, and whether this action is properly brought by them, or should have been brought by the executors of Garret I. Smith.

The principal of the legacy being a trust fund, any security in which it may have been invested, may, on well settled principles be claimed by the *cestuis que trust*. The plaintiffs were, I think, the proper parties to claim the fund. The executors of Garret I. Smith, when they paid it over to the

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widow, parted with all interest in it, and left it to follow the course directed by the will. They were required by the will to pay it over to the widow, and having done so were discharged from all liability, and divested of all power concerning it. If, as in the case of *Tyson v. Blake* (22 N. Y., 558), they had taken a bond for the return of the principal to them, to be disposed of according to the will, they might have been the proper parties to sue upon the bond. But they retained no such control over the fund, and the plaintiffs are now the real and only parties interested therein, and I think the action properly brought by them. The case of *Upwell v. Halsey*, before cited, sustains this position. There the action was brought by the sister, to whom the remainder was limited, against the defendant, who had married the testator's widow and become possessed of her personal estate. (See, also, *Trustees, etc., v. Kellogg*, 16 N. Y., 83.)

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur, except CHURCH, Ch. J., not voting.

Judgment reversed.

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HUGH MILLER, Respondent, v. MARCUS BALL, Appellant.

Where a parol contract for the sale of vacant land is silent as to possession, and the vendee has paid the entire consideration and fully performed on his part, and all that remains for the vendor to do is to give a deed, in the absence of any evidence to the contrary, there is an implied agreement or license that the vendee may at once take possession and have the use of the land.

*Suffern v. Townsend* (9 J. R., 35), *Erwin v. Olmstead* (7 Cow., 229), *Kellogg v. Kellogg* (6 Barb., 116) distinguished.

Defendant agreed by parol to sell to plaintiff certain wild, uncultivated land several miles distant from a highway. He delivered to plaintiff's agent a deed, who then paid the whole consideration. Plaintiff, on examining the deed, discovered that the consideration was not truly expressed, and that certain reservations were made, not authorized by the agreement; he therefore returned it to defendant, who agreed to have it corrected and returned. Plaintiff cut a road from the land to the

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highway, made roads on the land, underbrushed it, cut up fallen trees, preparatory to clearing about a quarter of an acre, erected a bough shanty, drew from the lot wood and timber and paid the taxes thereon. In an action to compel a specific performance of the agreement, *held*, that this was a sufficient part performance to take the case out of the statute of frauds.

(Argued February 16, 1876; decided February 25, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to compel a specific performance of an alleged parol contract for the sale of land.

The referee found in substance the following facts: That in the fall of 1863, Robert Miller, agent of plaintiff, without disclosing his agency, made a verbal contract with Philip Potter, defendant's agent, for the purchase of fifty acres of land at three dollars per acre, which he agreed to pay on delivery of a warranty deed, Potter agreeing to have a survey made and to procure the deed. The land was subsequently surveyed and its metes and bounds fixed. Defendant, upon receipt of the survey bill, executed a warranty deed of the premises to Robert Miller. The consideration was stated therein to be \$100, and there was a reservation of mines and minerals, and the right to use and occupy all streams for logging and milling purposes. The deed was delivered by Potter to Robert Miller, who delivered it to plaintiff, who objected to the statement of consideration and to the reservations and returned it to Robert, who returned it to Potter, who agreed to have it corrected and returned. The deed was sent back to defendant, who, after promising several times to fix the matter satisfactorily, in April, 1867, refused to execute a deed unless paid two dollars more per acre. Plaintiff tendered a deed and demanded that defendant execute the same, which he refused. The referee also found as follows:

"The land in question is situated about two and a-half miles from a highway in one direction, and about five miles



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in another, and was a wild, uncultivated lot, and of no practical value for cultivation until cleared, nor for any purpose without means of access to it by teams. In November, 1864, the plaintiff entered upon the lot, cut and constructed a road thereto across the adjoining lands of Sawyer & Russell and others, under a parol license from the owners, to construct, occupy and use the same, said road connecting with roads which the plaintiff also made upon the lot in question. He underbrushed and cut up fallen trees, preparatory to clearing about a quarter of an acre of land; built a bough shanty, and since that time and down to the commencement of this action, on the 12th day of April, 1867, he continued in the occupancy of the said lot, cutting trees and timber upon it, and paying the taxes thereon, and also continued to labor upon and improve the roads upon the lot and those connecting the same with the public highway."

*Samuel Hand* for the appellant. There was no sufficient contract or memorandum in writing to take this case out of the statute of frauds. (*Squires v. Norris*, 1 Lans., 282; *Townsend v. Corning*, 23 Wend., 435; *Richards v. Porter*, 6 B. & C., 437; *Cooper v. Smith*, 15 East, 103; *Smith v. Surman*, 9 B. & C., 561; *Wright v. Wicks*, 25 N. Y., 153; 3 Bosw., 372; 2 R. S., 135, §§ 8, 9; *Sears v. Brink*, 3 J. R., 210; *Rowan v. Hyatt*, 45 N. Y., 138; *Mortimore v. Cornwell*, Hoffm., 381; *Coleman v. Carrigues*, 18 Barb., 60; *Cagger v. Lansing*, 43 N. Y., 550; *Ford v. James*, 2 Abb. Ct. App. Dec., 159.) The contract being void under the statute was not made valid by any part performance or by the operation of equitable estoppel. (43 N. Y., 550; *Erwin v. Olmstead*, 7 Cow., 229; *Kellogg v. Kellogg*, 6 Barb., 116; *Spencer v. Tobey*, 22 id., 260; *Suffern v. Townsend*, 9 J. R., 35; *Jervis v. Smith*, Hoffm., 474; *Richmond v. Foote*, 3 Lans., 244, 250; Story's Eq. Jur., § 763; Fry on Spec. Perf., § 397, note 32; Sudg. on Vendors, 72; *Taylor v. Wakefield*, 6 El. & B. 765; *Freeman v. Freeman*, 43 N. Y., 34, 39; *Lobdell v. Lobdell*, 36 id., 327.) A parol ratification of a contract to



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sell lands, otherwise void, amounts to nothing. (*Haydock v. Stow*, 40 N. Y., 363.)

*Leslie W. Russell* for the respondent. Defendant having held Potter out to the world as his agent, was bound by the apparent authority he was presumed to have. (*Johnson v. Jones*, 4 Barb., 369; *Bridenbecker v. Lowell*, 32 id., 9; *Dunning v. Roberts*, 35 id., 463; *Nixon v. Brohan*, 10 Mod., 109; *N. R. Bk. v. Aymer*, 3 Hill, 270.) Defendant having ratified the acts of his agent, the ratification related back to confirm the original authority. (*Lawrence v. Taylor*, 5 Hill, 107.) If there was a memorandum sufficient to take the case out of the statute of frauds plaintiff having paid the purchase-price, specific performance would be decreed. (*Schroeppel v. Hopper*, 40 Barb., 425; *Losee v. Morey*, 57 id., 561; *Crary v. Smith*, 2 Comst., 60.) Defendant having allowed plaintiff, on the faith of the oral contract, to pay taxes, take possession and make improvements and other acts, a specific performance will be compelled. (Sugd. on Vendors [8 Am. ed.], 151; Story's Eq. Jur., § 759; *Malins v. Brown*, 4 Comst., 403; *Lowery v. Tew*, 3 Barb. Ch., 407; 2 Pars. on Con. [m. p.], 548; *Smith v. Onderdonk*, 1 Sandf. Ch., 579; 2 R. S., 135, § 10; 4 N. Y., 404, 420; *Pain v. Coombs*, 1 De J. & J., 34; *Harsha v. Reid*, 45 N. Y., 416; *Williston v. Williston*, 41 Barb., 643; *Traphagan v. Traphagan*, 40 id., 537; *Sahler v. Signer*, 44 id., 606; *Harris v. Knickerbocker*, 5 Wend., 638; *Burgess v. Simmons*, 45 N. Y., 225; *Baker v. Spencer*, 47 id., 562.) The presumption is that defendant knew of plaintiff's possession and acts. (*Brown v. Bowen*, 30 N. Y., 519; *Benson v. Bolles*, 8 Wend., 175; Matth. Pres. Er., 26; 2 Coke Litt., 122; *Poor v. Horton*, 15 Barb., 485; *Pike v. Morey*, 32 Vt., 37; *Lane v. Shears*, 1 Wend., 433; *Gregory v. Mitchell*, 18 Ves., 328, 333; *Dale v. Hamilton*, 5 Hare, 381; 2 Dart V. and P. [4th Eng. ed.], 937; Roberts on Frauds, 130, 131; *Parkhurst v. Van Courtland*, 14 J. R., 15.) There was a sufficient memorandum of the contract of sale. (*Welford v. Bigsby*, 3 Atk., 503; *Wright v. Weeks*, 25 N. Y., 153;

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*Peabody v. Speyers*, 56 id., 230; *Jervis v. Smith*, 1 Hoff., 470; Story's Eq. Jur., §§ 755–757; *Williams v. Bacon*, 2 Gray, 391; *Gale v. Nixon*, 6 Cow., 445; Sudg. on Vendors [m. p.], 130; *Norris v. Cooke*, 7 Dr. Cr. L., 37; *Kuhn v. Brown*, 1 Hun, 244; *Coles v. Trecothick*, 9 Ves. Jr., 234; *Brinker v. Brinker*, 7 Barr., 53; *Fowle v. Freeman*, 9 Ves., 351, 355; *Dykers v. Townsend*, 24 N. Y., 57; *Tawney v. Crowther*, 3 Bro. C. C., 161, 318, 320; *Pringle v. Spaulding*, 53 Barb., 17; *Peabody v. Speyers*, 56 N. Y., 233.) The omission of the name of the principal in the contract did not affect plaintiff's right to avail himself of a valid contract. (*Dykers v. Townsend*, 24 N. Y., 57; Code, § 111; 2 Pars. on Con. [m. p.], 508; *Nelthorpe v. Holgate*, 1 Colby, 203; *St. John v. Griffith*, 2 Abb. Pr., 198; *Bartlett v. Randall*, 3 Mer., 466; *I. P. and C. R. R. Co. v. Tyng*, Ct. Apps., 13 Alb. L. J., 100.)

EARL, J. We will assume, for the present purpose, that there was not a sufficient note or memorandum of the agreement between the parties to satisfy the requirement of the statute of frauds, and we still reach a conclusion adverse to the appellant.

There was sufficient evidence to sustain the finding of the referee that Potter was an authorized agent of the defendant to make the agreement and receive payment for the land. Plaintiff's brother, Robert, acted as agent for him in the negotiation with Potter, without disclosing the name of his principal. Yet, whatever rights were acquired by Robert belonged to the plaintiff, who employed him as agent, and furnished the money to pay for the land. The case may therefore be treated as if the negotiation had taken place and the agreement had been made directly between plaintiff and defendant.

The parol agreement was that plaintiff was to pay for the land \$150, and receive a warranty deed thereof. This agreement was made in December, 1863, or January, 1864. The defendant and his wife executed a deed in April afterward, which

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was delivered to the plaintiff's agent, who then paid the whole consideration of \$150. The deed was subsequently delivered to the plaintiff, who, upon examination of the same, found that the consideration was not truly expressed therein, and that it contained certain reservations not authorized by the agreement; and he declined to receive it, and returned it to defendant's agent, who agreed to have it corrected and returned to him. This was never done; but defendant did not repudiate the parol agreement, or decline, upon request, to perform it, until April, 1867, a short time before the commencement of this action. The land was a wild, uncultivated lot, part of a large tract of timber land. It was several miles from any public highway. In the fall of 1864, the plaintiff, by the consent of the owners of adjoining land, cut out and made a road for the distance of two and one-half miles from a public highway to this lot; and then and subsequently, prior to the commencement of this action, he made roads upon the lot, underbrushed and cut up fallen trees thereon preparatory to clearing about a quarter of an acre; built a bough shanty; annually cut and drew from the lot wood and timber, and paid the taxes thereon. These improvements, and the expenses to make them, were not very extensive, and yet the referee held, upon all the facts of the case, that there was a sufficient part performance of the agreement to take it out of the operation of the statute of frauds. Whether this holding was right is the sole question for our consideration.

It is not always easy to determine whether there has been sufficient part performance of a parol agreement for the sale of land, in the sense of courts of equity, to free it from the operation of the statute of frauds. The general rule is, that nothing is to be considered as a part performance which does not put the party into a situation which is a fraud upon him, unless the agreement is fully performed. (*Malins v. Brown*, 4 N. Y., 403.) The principle upon which courts of equity hold that part performance is sufficient is, that a party who has permitted another to perform acts on the faith of an agree-

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ment shall not be allowed to insist that the agreement is invalid because it was not in writing, and that he is entitled to treat those acts as if the agreement in compliance with which they were performed had not been made; in other words, upon the ground of fraud, in refusing to execute the parol agreement after a part performance thereof by the other party, and when he cannot be placed in the same situation that he was in before such part performance by him. Taking possession under a parol agreement, with the consent of the vendor, accompanied with other acts which cannot be recalled so as to place the party taking possession in the same situation that he was in before, has always been held to take such agreement out of the operation of the statute. (*Lowry v. Tew*, 3 Barb. Ch., 407; *Freeman v. Freeman*, 43 N. Y., 34.)

The payment of the consideration alone, in a case where its recovery in an action at law would fully indemnify the party paying, would not be a sufficient part performance within the rule under consideration, and neither would mere possession be, without any other circumstance of hardship or fraud. But payment of the consideration and possession under the agreement, or by the consent of the vendor, are facts which may be considered with other facts upon the question of part performance. Here the whole consideration-money was paid, and the plaintiff took all the possession of such a lot which is ordinarily practicable. He built roads to it and upon it; built a shanty and made some clearing. His improvements thus made were probably equal in cost to the consideration paid for the lot, and that cost would be lost to him unless the defendant be compelled to perform his agreement. He paid the taxes, and the money thus paid he cannot recover back. I am therefore of opinion that enough was done by the plaintiff to bring his case within the equitable rule as to part performance.

But before acts, otherwise sufficient for part performance, can have that effect within the rule, they must have been done in pursuance or fulfillment of the parol agreement, or in

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Opinion of the Court, per EARL, J.

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just reliance thereon. They must have been done with a view to the agreement, and be referable exclusively thereto. (Story Eq. Jur., 762, 764.) In the respects here mentioned, plaintiff's acts were sufficient. The plaintiff paid the entire consideration under the agreement. The land was vacant, covered with timber, and distant from any highway. The defendant promised to give a deed, tendered one which was incorrect, took it back for correction, and then, after retaining the money paid for two years, repudiated the agreement, and refused to perform. The defendant could have no use of the land without the roads which he constructed. After he paid the entire consideration, and thus fully performed on his part, it must have been understood by both parties that he was to have possession and control of the land, and the right to commence and prosecute his improvements thereon. After plaintiff had paid the full consideration, in reliance upon the promise of the defendant to give him the title to the land, there was an implied consent, on the part of the defendant, that he might take possession as owner. It cannot be inferred that defendant meant to retain the money and, at the same time, retain control of the land from the only person interested in the use and protection of the same. It may be stated, as a general rule, that in all cases where the contract for the sale of land is silent as to the possession, the land being vacant, and the vendee has paid the entire consideration, and fully performed on his part, and all that remains for the vendor to do is to give the deed, there must be an implied agreement or license that the vendee may at once take possession and have the use of the land. In such a case where the contract is in writing, and thus valid within the statute of frauds, the vendee is, in equity, considered the owner of the land, and he may even call the vendor to account for any waste committed thereon. He is, then, the only person interested in the protection of the land against waste or trespass; and he should have that possession which will enable him to protect his interests, and receive, in the use of the land, an equivalent for the money which he has

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paid. The same rule of construction should apply to a parol agreement. In the absence of any evidence to the contrary, it could not be inferred that in such a case the vendor intended to retain the use of both the land and the consideration paid therefor.

Our attention has been called to no authorities in conflict with these views. In *Suffern v. Townsend* (9 J. R., 35) it was held that an agreement for the purchase of land did not of itself amount to a license to the party agreeing to purchase to enter on the land; but that was in a case where there was a parol agreement, silent as to the possession, no part of the consideration having been paid. In *Erwin v. Olmsted* (7 Cow., 229) and *Kellogg v. Kellogg* (6 Barb., 116) the contracts were in writing, silent as to the possession, but no part of the consideration had been paid. In *Spencer v. Tobey* (22 Barb., 260) a part only of the consideration had been paid. It cannot, therefore, be said that the plaintiff was a trespasser in what he did upon the land; but all his acts thereon, and in building the road thereto, and in paying the taxes, must be referred to the agreement for the purchase, and must be considered as done in pursuance thereof, and in reliance thereon.

The judgment must therefore be affirmed, with costs.

All concur.

Judgment affirmed

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GEORGE W. PATTERSON, Jr., Respondent, v. HENRY H. BIRDSALL et al., Appellants.

A valid and subsisting obligation is not destroyed because included in a security or made the subject of a contract void for usury; although formally satisfied and discharged it may be revived and enforced in case the new security or contract is invalidated.

Plaintiff and H., being the owners of a mortgage upon defendants' premises, and having obtained judgment of foreclosure and sale thereon, agreed with defendants to bid in the premises, advance money to pay off a prior mortgage and to convey to defendant R. E. B., defendants to execute a new bond and mortgage to them; the

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agreement was carried out. H. assigned his interest in the new bond and mortgage to plaintiff. Subsequently these were adjudged void for usury. In an action brought by plaintiff to be subrogated to the rights of the prior mortgagee and to foreclose the prior mortgage *held*, that plaintiff and H., as junior incumbrancers, had, at the time of the usurious agreement, the right to pay the prior mortgage and to be subrogated; that this right was not destroyed by reason of entering into said agreement; but they were equitably entitled to the same benefits of the redemption as if made without such agreement, and by paying the debt they became entitled to a cession of the debt and a subrogation to all the rights of the mortgagee; and that the mortgage was to be regarded, as against the mortgagors, as still existing and uncanceled.

(Argued February 16, 1876; decided February 25, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, affirming a judgment in favor of plaintiff, entered upon the decision of the court at Special Term. (Reported below, 6 Hun., 632.)

This action was brought to enforce an alleged right of plaintiff, as junior mortgagee, to be subrogated to the rights of a prior mortgagee, under a mortgage executed by defendants.

The facts found by the court are substantially as follows:

On the 30th October, 1857, the plaintiff and John N. Hungerford held a judgment of foreclosure and sale which they had recovered in an action brought in this court against the defendants herein, who are husband and wife, to foreclose a mortgage executed by them upon lands in which the husband had an estate as tenant by the curtesy, and the wife had the fee by reversion. The premises were subject to a prior mortgage, executed by the defendants to Brundage Tompkins. On said 30th October, 1857, the plaintiff and Hungerford, being about to sell the premises under their judgment, and the defendants having applied to them for further time, it was agreed between the parties that plaintiff and Hungerford should put up the property for sale under their judgment, bid it in and convey it to the defendant Mrs. Birdsall, that they should also advance the money and pay the Tompkins mortgage, and that the defendants should execute to the plaintiff and Hungerford a bond and mortgage on the same



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premises, to secure the amount of their judgment, the cost and expenses of the sale, the amount of the Tompkins mortgage, and \$1,000 in addition. This agreement was carried out. The Tompkins mortgage was satisfied, and with the bond and satisfaction-piece were delivered to plaintiff and Hungerford; the latter sold and assigned his interest to plaintiff. In an action subsequently brought by defendants against plaintiff the new bond and mortgage were declared void for usury. (See 51 N. Y., 43.)

As conclusions of law the court found that plaintiff was entitled to a judgment subrogating him to the rights of Tompkins under his mortgage canceling the satisfaction-piece and declaring the mortgage a valid and subsisting lien, and to the usual judgment of foreclosure and sale.

*Geo. B. Bradley* for the appellants. Plaintiff could not enforce the Tompkins mortgage as a valid, subsisting lien in his favor on the premises. (*Rice v. Welling*, 5 Wend., 595, 598; *Kellogg v. Adams*, 39 N. Y., 28; *Winsted Bk. v. Webb*, id., 325; *Dewitt v. Brisbane*, 16 id., 508; *Schroeppel v. Corning*, 5 Den., 236.) Plaintiff had no right of subrogation. (*Ellsworth v. Lockwood*, 42 N. Y., 96; *Dauchy v. Bennett*, 7 How., 375; *Jenkins v. Cont. Ins. Co.*, 12 id., 66-69; 5 Wend., 598, 599; 37 N. Y., 353; 39 id., 325.)

*Geo. T. Spencer* for the respondent. Plaintiff was entitled to be subrogated to all the rights of the mortgagee. (*McLean v. Tompkins*, 18 Abb. Pr., 24; *Tompkins v. Seely*, 29 Barb., 212; *Pardee v. Van Aukin*, 3 id., 534; *Dauchy v. Bennett*, 7 How. Pr., 375; *Jenkins v. Cont. Ins. Co.*, 12 id., 66; *Averill v. Taylor*, 8 N. Y., 44; *Ellsworth v. Lockwood*, 42 id., 89, 96, 97; *Barnard v. Cooper*, 10 id., 96, 356; *S. L. Bk. v. G. North*, 4 J. Ch., 370; 2 Story's Eq. Jur., §§ 1023, 1024; 2 Barb. Ch. Pr., 164; *McLean v. Towle*, 3 Sandf. Ch., 117; *Marsh v. Pike*, 10 Paige, 395, 398; 1 Domat, 1784, p. 699; *Mad. Av. Bap. Ch. v. Bap. Ch. in O. St.*, 2 Robt., 642; *Robinson v. Ryan*, 25 N. Y., 320; *Gerwig v. Sitterly*, 94 Barb.,



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620 ; 56 N. Y., 214 ; 1 Domat, 1802, p. 704.) This right was not impaired or affected by the alleged usury which was the subject of the former litigation. (*Cook v. Barnes*, 36 N. Y., 520 ; *La Farge v. Herter*, 5 Seld., 241 ; *Rice v. Welling*, 5 Wend., 596 ; *McCramy v. Alden*, 46 Barb., 472 ; *Adams v. Kellogg*, 39 N. Y., 28 ; 64 Barb.; 620, 626 ; 56 N. Y., 214 ; *Gates v. Preston*, 41 id., 113 ; *Stackpole v. Robbins*, 48 id., 665 ; *Newton v. Hook*, id., 676 ; *Embury v. Conner*, 3 id., 511, 512 ; *People v. Johnson*, 38 id., 63, 65 ; *F. and M. Bk. v. Joslyn*, 37 id., 353, 355 ; *Robinson v. Stewart*, 10 id., 189, 197 ; *Worford v. Davis*, 28 id., 481, 484.)

ALLEN, J. The form which the parties have seen fit to give the transaction, brought under review by this appeal, cannot be ignored, when to do so would be a perversion of justice and against equity and good conscience. The transaction was in substance, as it was in form, so far as the mortgage sought to be enforced by the plaintiff is concerned, an advance of money to the mortgagee in redemption and discharge of the mortgage, and to relieve the premises from the incumbrance in favor and for the benefit of junior incumbrances held by the plaintiff. It was not a loan of money to the defendants, and was not so regarded by the parties. The intent was not to release the mortgage debt or relieve the premises from the incumbrance, but to continue the same in a new form and to extend the time of payment. The statutes against usury render void all contracts and securities which are the outgrowth of or depend for their support and consideration upon agreements which are usurious. (Laws of 1837, chap. 430.) Obligations and securities having an independent existence, and untainted by usury, are not affected by the statute, although they are the subjects of contracts tainted with the vice of usury.

A valid and subsisting debt is not destroyed because included in a security or made the subject of a contract void or invalid, either because violative of the statutes against usury, or for any other reason. Although formally satisfied

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and discharged, and the security surrendered, it may be revived and enforced in case the new security is invalidated and avoided. (*Rice v. Welling*, 5 Wend. 595; *Cook v. Barnes*, 36 N. Y., 520; *Robinson v. Stuart*, 6 Seld., 189; *Farmers and Mechanics' Bank of Genesee v. Joslyn*, 37 N. Y., 353; *Winsted Bank v. Webb*, 39 id., 325; *Gerwig v. Sitterly*, 56 id., 214.) Within the principle established by the authorities quoted, had the plaintiff, at the time of consummating the usurious agreement, been the holder of the bond and mortgage in suit, and canceled and surrendered the same, in pursuance of the agreement, it would have been revived upon the annulling of the usurious agreement and security, and he could have enforced the same, subject to any intervening equities of third persons that might have come into existence. The debt would not have been extinguished, the substituted contract being void. The defendants could not have availed themselves of the substituted invalid contract as a shield from liability upon the valid obligation. The case is not different in principle, for the reason that instead of satisfying a valid obligation held by himself, he has procured satisfaction by payment of an obligation held by a third person. The debt has not been paid by the debtor, nor released or extinguished, except as it has been included in a new and invalid security, and in equity as well as at law the debt revives in favor of the party who is the equitable owner and entitled to the benefit of it. (*Gerwig v. Sitterly*, *supra*.) Full effect should be given to the statutes against usury, but nice distinctions should not be favored for the purpose of extending the penalties to cases not within the spirit of the act. In *Dewitt v. Brisbane* (16 N. Y., 508), and *Schroepfel v. Corning* (5 Denio, 236), referred to by the counsel for the appellant, the assignments of the securities, and not the securities themselves, were held invalid.

The plaintiff, as a junior incumbrancer of the mortgaged premises, had a right to pay the mortgage and to be subrogated, either by assignment or by act and operation of law, to the rights of the mortgagee; and his act in paying was not

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necessarily the result of the usurious agreement with the defendants. His rights would have been the same had that agreement not been made, and cannot be held to have been destroyed by reason of his entering into that contract. Equity will give him the same benefit of his redemption as if he had redeemed voluntarily and without having made the illegal agreement with the defendants. The act of redemption may be referred to and sustained by the right rather than the usurious agreement of the parties. In support of the equities of the plaintiff, the usurious agreement may be laid out of view as the moving cause of the redemption. Having at the time of the agreement the right of redemption and subrogation, the agreement of the parties must be construed and carried out with respect to that right. He was the potential owner in equity of the mortgage, in virtue of his right of redemption, and the contract was not different in substance nor its consummation by the satisfaction of the mortgage, different in effect from what it would have been had he been the holder and owner in fact. By paying the mortgage he became entitled to a cession of the debt and a subrogation and substitution to all the rights and action of the mortgagee, and the mortgage must be regarded as against the mortgagors as still subsisting and unextinguished. (St. Eq. Jur., §§ 635, 1227; *Pardee v. Van Auken*, 3 Barb., 534; *Averill v. Taylor*, 4 Seld., 44; *Ellsworth v. Lockwood*, 42 N. Y., 89; *Jenkins v. The Continental Insurance Co.*, 12 How. P. R., 67.)

The defendants have the full benefit of the laws against usury when they avoid, as they have done, the contract which was tainted with usury, and can neither in equity or good conscience, or by virtue of any provision of the statute, claim that the pre-existing obligations, free from the vice of usury, which they have not paid or in any way satisfied or discharged, should not be enforced against them. The judgment was right and is well sustained by the reasons assigned at Special Term, and must be affirmed.

All concur.

Judgment affirmed.

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Statement of case.

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HENRY D. STANNARD et al., Respondents, v. SAMUEL F. PRINCE, Appellant.

Plaintiffs were forwarding merchants at T., and were employed by defendant to ship certain marble to him at P. The marble was shipped on board a canal boat which proceeded on the way as far as A. Learning that it was there delayed, one of the plaintiffs went to A. and there learned that the only tow-boat company it was practicable to employ to tow the boat down the H. river declined to take the boat unless the captain would pay an old bill, and would pay in advance the charge for towing. The captain had gone home to procure the money. Plaintiffs thereupon advanced the money and the boat was put into a tow, and by the negligence or unskillfulness of the employes of the tow-boat company was injured and sunk. In an action to recover for advances and charges, wherein the loss was set up as a counter claim, *held*, that plaintiffs acted simply as forwarders, not as carriers; that by the transactions at A., they did not assume the carriage of the property; that they had a right, and it was their duty to pay the advance charges, and although defendant was not liable for the advance on the account of the captain, it was for his benefit, and he could not complain; and that as the loss did not occur by any negligence on the part of plaintiffs, and was not a natural or ordinary consequence of any act of theirs, they were not liable therefor.

(Submitted February 16, 1876; decided February 25, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department affirming a judgment in favor of plaintiffs, entered upon the report of a referee.

This action was brought by plaintiffs as forwarders to recover charges and advances on a quantity of marble received and shipped by them for defendant.

Plaintiffs were engaged in business as forwarders at Troy, N. Y. In the fall of 1865 they received by railroad a quantity of marble consigned to them, belonging to and to be forwarded to defendant at Philadelphia, and they paid the charges, procured a canal boat to transport the same, on which the marble was shipped, and advanced to the captain seventy-five dollars on the freight. The boat proceeded to Albany to be there taken in tow. One of the plaintiffs

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learning that it was there delayed, went to Albany to ascertain the cause. He found that the proprietors of the only tow-boat company who would tow the boat had refused so to do unless the captain would pay an old bill of seventy-five dollars and would advance the charge (\$100) for towing the boat. The captain not being able to pay, had gone home to procure the money, and as he had not returned, the tow was about to proceed without his boat. Plaintiffs thereupon advanced the sum claimed. The boat was then put in the tow and other boats lashed to her stem, but so improperly fastened that in swinging around, her stem was torn off and she sank. This was the last tow of the season.

In a letter written by plaintiffs giving an account of the loss, it was stated that one of them had determined to go to New York, overtake the boat, and see her through, paying her bills if necessary. Defendant had written prior to the shipment, urging haste. One letter contained the following: "I do not mean to limit you in the freight so as to prevent shipping in good season. \* \* \* Am anxious to get my marble through before ice makes, and will expect you to do the very best you can for me in the way of freights, dispatch, etc."

Further facts appear in the opinion.

*Esek Cowen* for the appellant. Plaintiffs assumed the duties and liabilities of common carriers, and are liable to defendant for the loss of his goods. (*Teal v. Sears*, 9 Barb., 317; *Garvey v. Jarvis*, 46 N. Y., 310; *Wilson v. Tumman*, 6 M. & G., 236.)

*Irving Browne* for the respondents. Plaintiffs were not common carriers in a legal sense. (*Roberts v. Turner*, 12 J. R., 232.)

CHURCH, Ch. J. The plaintiffs, in receiving the marble at Troy, engaging the boat Smith for its transportation to Philadelphia, and advancing a portion of the freight, acted as

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forwarders simply, and not as carriers. They had no interest in the freights, nor in boats or vessels, nor did they assume to act as carriers in the particular transaction. Judge STORY defines "forwarding merchants" as "a class of persons well known in America, and usually combine in their business the double character of warehousemen and agents, for a compensation, to ship and forward goods to their destination," \* \* \* "and, of course, they are responsible for ordinary care and skill and diligence" (Story on Bailment, § 444); and SPENCER, J., said, in *Roberts v. Turner* (12 J. R., 232), "that a person thus circumstanced should be deemed an insurer of goods forwarded by him, an insurer, too, without reward, would, in my judgment, be not only without a precedent, but against all legal principles." When the business of forwarding and transporting goods are combined, it becomes a question, often a difficult one, to determine in which capacity the person held the goods at the time of the injury or loss. In the case of *Teall v. Sears* (9 Barb., 317) the court held the defendants liable, partly on the ground that they held themselves out as carriers, and partly upon the ground that, from the facts disclosed, they assumed the carriage of the property themselves. In the case at bar there is no such complication of facts. It is evident from the letters of the defendant to the plaintiffs that he employed them as forwarders only. In one letter he says: "I do not mean to limit you in the freight so as to prevent shipping in good season," \* \* \* "and will expect you to do the very best you can *for me in the way of freight, dispatch, etc.*," thus showing that the plaintiffs were acting as agents merely to forward the property for the defendant. It is found by the referee that when the boat Smith left the dock at Troy the plaintiffs had discharged their whole duty to the defendant. This finding is undoubtedly correct. But it is claimed, on behalf of the defendant, that the transactions at Albany changed the liability of the plaintiffs, and that then they assumed the carriage of the goods and responsibility of carriers. The findings of fact are rather meagre to properly present the question, but per-

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haps it may be considered without violating the rule of not looking into the evidence to find a reason for reversing a judgment. The plaintiffs learned that the boat was delayed at Albany, and went there to ascertain the cause, and found that the proprietors of the only tow-boat company which it was then practicable to employ to tow the boat down the river declined to take the boat unless the captain would pay an old bill for towing, of seventy-five dollars, and \$100, in advance, for towing the boat at that time, and that the captain had agreed to pay these sums, and had gone home to procure the money. The plaintiffs advanced the money, \$175, and the boat was put into the tow by the employes of the tow-boat company, and in turning around, in consequence of the improper manner in which the boat was attached, it was injured and sunk. I do not think it can be affirmed that the plaintiffs intended to take possession of the boat on their own account, and assume the carriage of the property themselves. There was not an abandonment of the boat by the captain. He had engaged the tow, and was absent to procure the money required by the towing firm. As to the \$100 for towing the boat, the plaintiffs had a right, and I think it was their duty to pay it. They had undertaken the duty of forwarding the goods, and the advance payment was necessary for that purpose, and they had made arrangements with the defendant to draw on them for similar advances. The seventy-five dollars was paid on account of the captain. It was clearly for the benefit of the defendant, and although he is not liable for it, he has no reason to complain. The plaintiffs, in what they did at Albany, simply removed the obstruction to the passage of the boat, and enabled it to fulfill the contract already made. The plaintiffs did not take possession or control of the boat. It was late in the season; the ice was forming in the river; this was the last tow going down; the defendant had repeatedly urged the plaintiffs to hasten the progress of the marble, as they feared it would freeze in. The plaintiffs were therefore active and vigilant, more so, perhaps, than their duty required, but their acts were all in

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Statement of case.

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their capacity of forwarders; and in volunteering to make extraordinary exertions they acted at the request of the defendant, and, as it appears, in good faith for their interest. Their statement in a subsequent letter that they intended to go to New York and see the boat through to Philadelphia, and if necessary, pay the bills, would have been acts of the same character, acts induced by the urgent solicitation of the defendant. If their negligence had caused the accident, they might have been liable, but not because they were carriers or insurers. It is found that they saw the boat attached, and knew how it was done, but they did not attach it, nor does it appear that they knew even the effect which would be likely to be produced by the manner of adjusting the hawser. We are unable to perceive any reason for holding the plaintiffs liable as carriers, or otherwise, for the loss that occurred. Their fault, if any, was an excess of caution in behalf of the defendant, for which, under the circumstances, they ought not to suffer in pecuniary damages. But for their intervention at Albany it is quite probable that the boat would not have been taken in the tow, and the loss would not have occurred; but the loss was not the natural or ordinary consequence of their act, and was not, in any legal sense, caused by it.

The judgment must be affirmed.

All concur.

Judgment affirmed.

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| 64  | 304 |
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WILLIAM EVANS, Appellant, v. THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, Respondent.

A policy of life insurance contained a clause avoiding it in case the insured should visit any part of the United States lying south of a specified line, between the first of July and the first of September, without a written permit. He had a permit authorizing him to go and remain south until July 1, 1870. He remained until he died, March 18, 1872. In an action upon the policy, it appeared that the health of the deceased, in the sum-



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mer of 1870, was very poor, so that he could only ride out in a buggy to his plantation and back, and was never any better. It was not proved that he was too unwell to return, or that he made any effort to do so. *Held*, (1) that if inability was an excuse and a failure to return in consequence would not have been a breach of the condition, the facts did not sustain the claim, as it did not appear that the insured was, prior to July first so unwell as to render it impossible for him to return by any of the usual modes of travel; (2) that inability was not an excuse, as when the insured went south he took the chances of his being able to return.

On the day the annual premium became due in 1870, an agent of the owner of the policy called at defendant's office to pay it. Defendant declined to receive it because the insured was residing south, unless a percentage on the amount insured was paid in addition, and agreed with the agent to continue the policy and give credit for the amount claimed until the next day. On the next day the premium and the percentage claimed were tendered, but defendant refused to receive them. Tender was also made in 1871, and refused. *Held*, that as there was no agreement to pay, binding upon the owner, the promise of defendant was without consideration and not obligatory; but that even if the agreement was binding and the tender good to keep the policy in force for a year, it did not bind defendant to continue it in force thereafter, and defendant had the right to refuse so to do.

(Argued February 18, 1876; decided February 25, 1876.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, reversing a judgment in favor of plaintiff entered upon the report of a referee. (Reported below, 3 Hun, 587; 6 T. & C., 331.)

This action was upon a policy of life insurance issued by defendant upon the life of one Charles A. Starr to one Samuel W. Leddell, a creditor of Starr's, and plaintiff's assignor. The policy was dated October 28, 1869, premiums payable annually. The policy contained these conditions, among others, that if the insured should, between the first of July and the first of September, visit those parts of the United States lying south of the southern boundaries of Virginia or Kentucky without the written consent of the company, the policy would be void and all payments forfeited. Also, that if the annual premiums were not paid on or before the days specified, the policy should cease and determine.

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Statement of case.

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The referee found that on November 1, 1869, defendant gave to Starr a permit to reside in Louisiana from that time until July 1, 1870, under which permit he removed to Louisiana, about the time the permit was granted, and died there on the 18th of March, 1872, never having returned to the north on account of his health being too feeble. That on the 28th day of October, 1870 (the day on which the premium was due), said Leddell, by the hands of Theodore W. Phenix, tendered to the defendant, at its office, the annual premium, whereupon the defendant claimed a further sum of two and a-half per cent on the amount of the policy, additional premium for the extra risk incurred by the residence of Starr in Louisiana. That the said Phenix stated to said defendant that he could not pay more than the amount tendered, without the authority of Mr. Leddell, whereupon the defendant agreed to continue the policy in force and give credit for the premium due, including the extra amount demanded, until the following day, in order to give Phenix time to report the demand to Leddell, and Leddell time to comply with it. That on the said 29th day of October, 1870, Leddell tendered to the defendant the amount in full required by the company, which defendant refused to receive. That on the 27th of October, 1871, Leddell again tendered the premium with the per centage claimed, which was refused.

The only evidence as to the inability of the insured to come north was that of one witness, who testified that Starr's health, in the summer of 1870, was very poor, and he could only ride out to the plantation, in which he was interested, in a buggy and ride back, never getting out of it, and that he was never any better.

*F. G. Salmon* for the appellant. The agreement of defendant to give credit, with tender of the premium within the time allowed, was as effectual as if payment had been made in the first instance. (*Boehen v. Williamsburg F. Ins. Co.*, 35 N. Y., 131.) The policy was not forfeited by the insured remaining south until he died. (4 Kent's Com. [m.

## Opinion of the Court, per EARL, J.

p.], 125, 126, 129, 130; *Helme v. Phila. L. Ins. Co.*, 61 Penn., 107; *Baldwin v. N. H. L. Ins. Co.*, Ct. Apps. Dec., 1875; *Doe v. Banks*, 4 B. & Ad., 664; *Roberts v. Davy*, 4 id., 644; *Hyde v. Watts*, 12 M. & W., 254; *Sands v. N. Y. L. Ins. Co.*, 50 N. Y., 626; *Cohen v. N. Y. Mut. L. Ins. Co.*, id., 610.) If there was a forfeiture defendant waived it. (*Young v. Mut. L. Ins. Co.*, 4 Big. L. Ins., 1; *Bodine v. Exch. F. Ins. Co.*, 51 N. Y., 117; *Bowman v. Ag. F. Ins. Co.*, 59 id., 521; 35 id., 131; *Shearman v. Nia. F. Ins. Co.*, 46 id., 526, 530; *Trustees First Bap. Ch. v. Bklyn. F. Ins. Co.*, 19 id., 305.) The tenders of premium made were sufficient, and kept the policy in force. (*Vaupell v. Woodward*, 2 Sandf. Ch., 143; *Stone v. Sprague*, 20 Barb., 509; *Everett v. Saltus*, 15 Wend., 474.)

*Edgar S. Van Winkle* for the respondent. The policy was forfeited by the insured remaining south after July 1, 1870. (*Pier v. Finch*, 29 Barb., 176; *McKyring v. Bull*, 16 N. Y., 297; *Wright v. Hooker*, 10 id., 51; *Carpenter v. Stevens*, 12 Wend., 589; *Depuy v. Swart*, 3 id., 139; *Towle v. Jones*, 1 Robt., 87; 19 Abb., 449; *Dusenbury v. Hoyt*, 4 J. & S., 94; *Stevenson v. Buxton*, 15 Abb. Pr., 352.) There was no waiver of the forfeiture by defendant. (*Ripley v. Aetna Ins. Co.*, 30 N. Y., 136, 164; *Hutchings v. Munger*, 41 id., 155; *Smith v. Sar. Mut. F. Ins. Co.*, 3 Hill, 508.) There was no good tender of the premium made. (1 Gr. Pr., 249, 541; *Wilder v. Seelye*, 8 Barb., 408; *Livingston v. Harrison*, 2 E. D. S., 197; 3 Chit. Pldgs., 955, 1018; *Simpson v. French*, 25 How. Pr., 464.)

EARL, J. The policy contained a provision that it should be "void, null and of no effect," in case Starr, whose life was insured, should, between the first day of July and the first day of November in any year, visit any part of the United States lying south of the southern boundaries of Virginia and Kentucky without the written consent of the company. In November, 1869, he went to Louisiana and remained there

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Opinion of the Court, per EARL, J.

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until he died, on the 18th day of March, 1872. The defendant alleged this as a breach of the policy and refused payment upon this ground. He had the written permit of the defendant to go to New Orleans and remain there until the 1st day of July, 1870. The claim on behalf of the plaintiff is that he became so sick and feeble that he could not return, and hence that his return was rendered impossible by the act of God, and that, therefore, his absence was excused and there was no breach of the policy. Even if this claim were otherwise valid the facts do not sustain it. The only proof upon the subject is that he met with an accident before going south; that his health was very poor in the summer of 1870, and "he could only ride out to the plantation in which he was interested in a buggy, and ride back, not getting out of it, and was never any better." No witness testified that he was too unwell to return north or that he made any effort to return, and his condition before July first was not described. To bring the case within the supposed rule there should have been proof that for some time before July first he was unable to travel by any of the usual modes; not that it was merely inconvenient for him to travel, but impossible. He was bound to return if he could travel by short stages, or by incurring unusual expense to secure comfort, safety and convenience. But another answer to this claim is that he took the chances of being able to return. He went south for business purposes, knowing that the policy would be avoided if he did not return by the first day of July. He had the right to go and remain there until July first without the permit of the company. He obtained that that he might, without violating another condition in the policy, go and return upon the ocean if he desired to. He was feeble when he went and he could not go so far south that he could not return, and after remaining there until he was too feeble to return enable the holder of the policy to claim that his return was rendered impossible by the act of God, and that thus the breach of the condition was excused.

The policy, therefore, became absolutely void after July 1,

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Opinion of the Court, per EARL, J.

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1870. It was unnecessary for defendant to make any election or to do any thing else to render it void. It became dead by its own terms, and could never again have any vitality except by some sufficient act of the defendant reclothing it with life. The claim of the plaintiff is that it was revitalized by what took place on the 28th and 29th days of October, 1870. On the former day an agent of plaintiff's assignor went to the office of the defendant and offered to pay the annual premium and tendered the amount to defendant's officers. They declined to receive it on account of the residence of Starr in Louisiana, unless he would pay two and a-half per cent more on the amount insured on account of the extra risk occasioned by such residence. The agent then stated that he could not pay the extra sum claimed without the authority of his principal, whereupon the officers agreed to continue the policy in force and give credit for the premium due, including the extra amount claimed, until the following day, in order to give the agent time to report to his principal and his principal time to comply. On the next day plaintiff's assignor sent another agent to the office of the defendant and he then tendered the amount of the premium, together with the extra amount as claimed on the prior day, and the officers refused to receive it, claiming that the policy was void.

Assuming that the policy was kept in force for the one day by what took place on the twenty-eighth, there was nothing to extend its existence beyond that day. There was no bargain then made to continue it longer. Plaintiff's assignor did not agree to pay and was not bound to. It was at most on the part of the defendant a proposition to revive the policy on the twenty-ninth, upon payment of the sum named. In other words, it was a proposition to enter into an engagement on the twenty-ninth. That proposition did not bind either party, and the defendant had the right on the twenty-ninth to refuse to receive the money and decline the engagement it had offered to make.

But suppose defendant was bound to receive the sum tendered on the twenty-ninth for the year following that date,

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and that the policy was thus in force during that year, how was it kept in force after October 28, 1871? What took place in October, 1870, certainly did not bind the defendant to a new policy during the whole life of Starr. It did not give him a permit to continue in the south as long as he chose to stay there, and entirely annul the condition in the policy as to a southern residence. The defendant, therefore, had the right in October, 1871, to refuse to continue the policy any longer, notwithstanding what had before taken place.

The order of the General Term must be affirmed, and judgment absolute entered against the appellant, with costs.

All concur; CHURCH, Ch. J., on the ground last stated.

Order affirmed, and judgment accordingly.

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IN THE MATTER OF THE PETITION OF DANIEL P. INGRAHAM  
TO VACATE AN ASSESSMENT.\*

In proceedings to vacate an assessment for constructing a sewer in Ninety-first street, New York, it appeared that the petitioner being the owner of lands between Ninetieth and Ninety-second streets, conveyed a portion thereof bounded "north-easterly by the center line of Ninety-first street," subject to a right of way over the portion of said street so conveyed. The assessment was claimed to be invalid, because the corporation had not acquired title to the land of said street. *Held*, untenable; that it was not to be assumed, in the absence of proof, that the sewer was laid upon the petitioner's half of the street, or in the center thereof, and that a party, to avail himself of such an objection, must show affirmatively that his rights have been invaded; that as to the other half of the street, a permission from the owners would be sufficient to authorize the construction of the sewer, and it not appearing that any such permission was not given, or that the owners objected, the legal presumption was that permission was given; but that, if no consent was given, it was not a valid ground of objection that a trespass had been committed upon the lands of another.

Also, *held*, that it was not unlawful to include in one contract the construction of two sewers disconnected with each other, but to be built in

\*This case was not reported in its order, as decided, for the reason, that a motion was pending to amend the remittitur so as to allow the petitioner a rehearing. The decision upon said motion appears by the opinion.

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accordance with the plan adopted for sewerage in the district; and that it was proper to assess the expense thereof in one assessment.

This court has not authority upon affirmance of an order denying an application to vacate an assessment, to allow the petitioner a rehearing in the court below, or to authorize him to renew his application upon further proof; it can simply so frame its judgment that it shall not be an obstacle to the petitioner obtaining relief in the proper form, *i. e.*, that the affirmance be without prejudice to an application to the court below for relief.

(Argued June 1, 1876; decided June 22, 1876.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, affirming an order of Special Term which denied the application of the petitioner to vacate an assessment upon his lots on the north side of Ninety-first street, in the city of New York, for a sewer in said street, between Second and Fourth avenues, and a sewer in Eighty-eighth street, between Second and Third avenues. (Reported below, 4 Hun, 495.)

The objections were that the two sewers, entirely disconnected, were embraced in one contract, and a single assessment made. Also, that the corporation had acquired no title to Ninety-first street, and had no authority to build a sewer there. The facts sufficiently appear in the opinion.

*Jno. E. Burrill* for the appellant. There never has been a dedication of the land of the street to the city. (*Child v. Chappelle*, 9 N. Y., 257; *City of Oswego v. Oswego Canal Co.*, 6 id., 262; *Underwood v. Stuyvesant*, 19 J. R., 186; *Fonda v. Borst*, 2 Keyes, 48; *Kelsey v. King*, 33 How. Pr., 39; *Livingston v. Mayor, etc.*, 8 Wend., 99; *Badeau v. Mead*, 14 Barb., 338, 339; *Rissell v. N. Y. C. R. R. Co.*, 23 N. Y., 67; *In re Anderton Park*, N. Y. C. Pleas; *Holden v. Trustees, etc.*, 21 N. Y., 474; *Cincinnati v. White*, 6 Pet., 431; *Haynes v. Thomas*, 7 Ind., 38.) Until the corporation acquired title to the land no one had a right to use it except for the purpose of passage, and the use for any other purpose was a trespass. (33 How. Pr., 39; 23 N. Y., 67; *Pearsall*



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Opinion of the Court, per *Curiam*.

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v. *Post*, 20 Wend., 111; 22 id., 425; *Trustees v. Auburn Co.*, 3 Hill, 567; 3 Kent's Com. [m. p.], 433, § 52, sub. 3; Wash. on Easements, 196; *Hunter v. Trustees, etc.*, 6 Hill, 406-412; 6 Pet., 438.) There was a substantial error in levying the assessment. (*In re Sharp*, 1 T. & C., 427; *In re Babcock*, 23 How. Pr., 118; *In re Buhler*, 19 id., 317; *In re Beamis*, 17 id., 460.)

*D. J. Dean* for the respondent. The distribution of the assessment was confided to the discretion of the assessors. (Laws of 1813, chap. 86, § 175, p. 1191; *Leroy v. Mayor*, 20 J. R., 430; *In re Degraw St.*, 18 Wend., 568; *Lyon v. Brooklyn*, 28 Barb., 609; *Bushwick Ave. Case*, 48 id., 9.) The fact that the sewer was laid in private property was not a fraud or substantial error. (Laws of 1874, chap. 312; 12 Abb., 121-124; *Hays' Case*, 14 id., 53; 23 id., 118.) The street had been dedicated to the public for all the uses to which a city street is applicable. (*Holdane v. Trustees*, 21 N. Y., 474; *Bissell v. N. Y. C. R. R. Co.*, 23 id., 61-65; 11 Wend., 486; 19 id., 128; *Post v. Pearsall*, 22 id., 434; 1 Hill, 189, 191; *Hunter v. Sandy Hill*, 6 id., 412; *People v. Utica*, 65 Barb., 10.) This action could not be maintained under chapter 313 of the Laws of 1874. (*In re Mayer*, 50 N. Y., 504; *Lennon v. Mayor, etc.*, 55 id., 361.)

*Per Curiam*. The petitioner seeks to vacate the assessments made upon his lots, on the north side of Ninety-first street, between Lexington and Third avenues, for the construction of a sewer in said Ninety-first street and Eighty-eighth street.

It appears that the petitioner, owning lands between Ninetieth and Ninety-second streets, with his wife, by deed bearing date the 1st day of February, 1849, conveyed to Daniel Fanshaw eight lots of land, bounded "north-easterly by the center line of Ninety-first street, and south-westerly by the center line between Ninetieth and Ninety-first streets, \* \* \* subject to a right of way over the portion of



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Opinion of the Court, per *Curiam*.

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Ninety-first street, hereby conveyed, to G. Rollins, his heirs and assigns, forever, to lots lying north-westerly of the premises hereby conveyed."

It is claimed that the assessment was invalid because the corporation never acquired the title to the lands forming Ninety-first street, through the center of which it is alleged the sewer is laid.

We are of the opinion that this position cannot be maintained. The appeal papers presented do not show that the sewer is laid on the northerly half of the street to which the petitioner claims title, nor in the center of the street. For any thing which appears, it may have been laid upon the south half of said street, and upon lands which he has conveyed away to Fanshaw in the deed referred to. It is by no means to be inferred that the sewer was laid upon the petitioner's one-half of the street or in the center of the same; and the party objecting should make it appear by affirmative proof that his rights have been invaded, before he is entitled to avail himself of the objection urged.

It may be assumed that sewers are not always laid in the center or upon one side of a street alone; and, therefore, it by no means follows that in this case the sewer in question was on land claimed by the petitioner. In the petition it is stated that the southerly half of the street is the property of and owned by individuals, and not by the city; and the affidavit of the petitioner shows that the southerly half of the street, so far as he has any knowledge, has never been ceded to the city authorities. These allegations do not interfere with the right of the city to lay down the sewer. A permission from the owner or owners would be sufficient authority for that purpose; and as it is not shown that no such permission was given, and as it does not appear that these owners object, the legal presumption is that the city authorities were acting under a proper license, and had ample power to perform the work.

This must be assumed until the contrary is established by sufficient proof. It is for the petitioner to make out that

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Opinion of the Court, per *Curiam*.

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the authorities have acted in violation of law in imposing upon him the assessment which he seeks to avoid. Nor is it enough to establish that, in carrying out the improvement, they have committed a trespass upon the lands of another party. That is a matter which rests between the city authorities and the person affected, and is not a valid ground of objection by a party assessed who has no interest in the land upon which the sewer is laid.

A point was made that the assessment was invalid because the assessment upon the petitioner's land embraced the expenses of the sewer in Eighty-eighth street, which is wholly disconnected with the sewer in Ninety-first street.

It appears that the sewers were built in accordance with the plan adopted for sewerage in the district in which it is located, in pursuance of the act of 1865 (chapter 381). Although that act confers no express authority to combine the building of two sewers in one contract and to assess the expenses thereof in one assessment, there is no objection to such a proceeding. The assessors are authorized to assess the expense upon the owners and occupants of the property benefited by the improvement made. (S. L. of 1865, *supra*, § 6.) The assessors had jurisdiction in this case, and having exercised their discretion there is no lawful ground for interfering with their action. Nor is any sufficient objection urged why two sewers might not be lawfully united and laid under one contract and assessments made at the same time for both of them. No injustice appears to have been done to the petitioner on this account, and it furnishes no ground for vacating the assessments complained of.

It is not necessary to discuss the question whether there has been a dedication of the northerly half of the street to the public, by the petitioner, for the use of the city, if the views already expressed are sound. While there is evidence tending to establish that there was a dedication, it is not essential to the disposition of the case to determine that question.

No other point is made which demands especial considera-

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Opinion of the Court, per *Curiam*.

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tion; and the order of the General Term must be affirmed, with costs.

All concur.

Order affirmed.

Opinion on motion to amend remittitur.

*Per Curiam.* A motion is made on the part of the petitioner that the remittitur in this case be amended so as to allow the petitioner a rehearing in the court below, or to renew his application on further proofs. This motion is founded upon affidavits to the effect that the defect of proof upon which this court based its judgment of affirmance can be supplied upon a new hearing, and that the point upon which the case was decided in this court was not taken in the court below.

These considerations might properly and probably would induce the court below to reopen the case and allow the proofs to be supplied, but it is beyond the province of this court to afford such relief. So far as it can, however, it is disposed, under the circumstances of the case, so to frame its judgment that it shall not be an obstacle to the petitioner obtaining in the proper form the relief which he seeks.

The case was decided in the court below, on the ground that the land which is claimed by the petitioner and through which the sewer was constructed had been dedicated to the public as a street. When the case came to this court the point was taken by the counsel for the corporation that the proofs before the Special Term failed to show that any part of the sewer was on the land claimed by the petitioner, or that the owner of the land, where it was located, had not consented to its being placed there. This point, on examination, was found to be well taken. The question whether the land had been dedicated as a street was not, therefore, reached, and was not passed upon by this court. If the defect in the proof should be supplied and it should be shown that the sewer was constructed upon the half of the street claimed by the petitioner, and that the owner of the other

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half did not consent, then it will be material to inquire whether the land embraced in the street had been dedicated to the public. It is proper that the petitioner should have an opportunity to put his case in such shape that this question can be decided.

We, therefore, direct that the remittitur be amended so as to show that the question of dedication was not passed upon, and to state that the affirmance of the order is without prejudice to an application by the appellant to the court below to reopen the case and allow the parties a rehearing on further proofs, or, if the petitioner desires, to present a new petition that the affirmance is without prejudice to such new application.

All concur.

Ordered accordingly.

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LEONARD D. WHITE et al., Appellants, v. THE CONTINENTAL NATIONAL BANK, Respondent.

The drawee of a bill of exchange, by accepting and paying it, only vouches for the genuineness of the signature of the drawer, not of the body of the instrument; the holder claiming to be entitled to receive the amount thereof is held to a knowledge of his own title and of the genuineness of every part of the bill save the signature of the drawer, and the drawee has a right to rely upon the presumptive ownership of the apparent holder.

Plaintiffs, on the seventeenth of April, accepted and paid to defendant a bill drawn upon them, which, before acceptance, had been altered by raising the amount. The bill had been deposited with the defendant, and the amount credited to the depositor; the forgery was not discovered until October fifth. In an action to recover back the money paid, *held* (MILLER, J., dissenting), that as defendant, in dealing with the bill or its avails, did not act upon the faith of any admission of plaintiffs, expressed or implied, as to the genuineness of the body of the instrument, or of any act or declaration on their part, but upon the apparent title and genuineness, and the responsibility of those from and through whom it received the bill, plaintiffs owed no duty to it in respect to the forgery, and that no negligence on their part could defeat their right of recovery

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*The Con. Nat. Bank v. The Nat. Bank of Com.* (50 N. Y., 575) distinguished. Also, *held*, that regarding the case as one of mutual mistake in respect to which neither party was in fault, plaintiffs were entitled to recover.

(Argued December 8, 1875; decided March 21, 1876.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, affirming a judgment in favor of plaintiffs entered upon a verdict, and affirming an order denying a motion for a new trial.

This action was brought to recover back money paid by plaintiffs to defendant, upon an altered sight draft drawn upon plaintiffs by their correspondent in Buffalo.

The draft was drawn for the sum of twenty-seven dollars. After its delivery to the payee, and before presentation and acceptance, it was altered so as to change the amount to \$2,750. It was sent by one Horton, of Baltimore, to Austin Baldwin & Co., New York, and received by them August 16, 1869. That firm deposited it on the same day with defendant, and for its avails sent to Horton a sterling bill of exchange on London at sixty days. Defendant credited said firm the amount of the draft. The draft was presented, August seven-teenth, to and accepted by plaintiffs, payable at the Leather Manufacturers' Bank, by whom it was paid to defendant. In the regular course of business between plaintiffs and the drawer of the draft, monthly statements of accounts were rendered. The August account was rendered the forepart of September. It was not examined by the drawer until October fifth, when the alteration was first discovered. Plaintiffs were advised on the sixth, and immediately notified defendant.

The court charged among other things: "If the jury believe from the evidence, that if Austin Baldwin & Co. had been, either directly by the plaintiffs or by them through the defendants, informed within a reasonable time after the acceptance of the draft by the plaintiffs, that the same was forged for an amount exceeding the sum of twenty-seven dollars, they,

## Statement of case.

Austin Baldwin & Co., or the defendants, could have taken steps to trace and arrest the crime in its consummation, and have prevented the acceptance of their bill of exchange on the City Bank of London, and that they failed to take either of such steps by reason of the acceptance and payment of the draft in question by the plaintiffs, and the failure of the plaintiffs to advise them of such forgery until on or about October 6, 1869, then the plaintiffs are estopped from denying the genuineness of the draft in question, and that the defendants are entitled to a verdict." To which the plaintiffs' counsel excepted.

Plaintiffs' counsel requested the court to charge, that plaintiffs were not bound to know that this draft had been altered in the way it was altered; and that all they were bound to know when they accepted it was that the signature to the draft was genuine. Also, that if the plaintiffs were not legally chargeable with knowledge of the fact that the draft had been altered, no duty devolved upon them to give any earlier notice than was given, either to Austin Baldwin & Co. or anybody else, of the fact of the alteration.

The court declined so to charge, and the plaintiffs' counsel excepted.

*Hamilton Odell* for the appellants. By the certification of a check the drawee is concluded only as to the signature of the drawer and his own certification. (*Bank of Commerce v. Union Bank*, 3 N. Y., 230; *Bk. of Com. v. Mech. Bking. Assn.*, 55 id., 211; *Espy v. Bank of Cincinnati*, 18 Wall., 605; *Holt v. Ross*, 54 N. Y., 472; *Cases of Marine Bank and Bank of North America*, Ct. of Apps., not yet reported; see 14 Amer., 237, note; *Chapman v. White*, 6 N. Y., 417; *Byles on Bills*, 11; *F. Bk. v. B. and D. Bk.*, 16 N. Y., 125; *Barnes v. Ont. Bk.*, 19 id., 159; *Meads v. Mer. Bk.*, 25 id., 143; *Mer. Bk. v. State Bk.*, 10 Wall., 647; *Harker v. Anderson*, 21 Wend., 372.) Plaintiffs were not chargeable with knowledge of the forgery. (*Canal Bk. v. Bank of Albany*, 1 Hill 291; *Bk. of Commerce v. Union Bk.*, 3 N. Y., 236;

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Opinion of the Court, per ALLEN, J.

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*Koontz v. Central Bk.*, 51 Mo., 275; *Lawrence v. Am. Bk.*, 54 N. Y., 436; *Contl. Bk. v. Bk. of Comm.*, 50 id., 575; *Kingston Bk. v. Eltinge*, 40 id., 391; 55 id., 215; 18 Wall., 619.) The judge erred in refusing to direct a verdict for the plaintiffs. (*Harris v. Wilson*, 1 Wend., 511; *Small v. Smith*, 1 Denio, 586; *Gale v. Wells*, 12 Barb., 94; *Underhill v. Railroad Co.*, 21 id., 497; *Storey v. Brennan*, 15 N. Y., 526, 528; *Rouse v. Lewis*, 2 Keyes, 359; 50 N. Y., 587.)

Wm. Allen Butler for the respondent. The case was properly submitted to the jury. (*Bk. of Com. v. Nat. Mech. Bk.*, 55 N. Y., 211, 213; *Un. Bk. of Troy v. Sixth Nat. Bk. of N. Y.*, 43 id., 452, 456.) It was not necessary that it should appear that defendant acted affirmatively upon the faith of plaintiffs' acceptance in order to entitle it to the benefit of an estoppel. (*Cont. Nat. Bk. v. Nat. Bk. of Com.*, 50 N. Y., 575; *Howard v. Hudson*, 2 E. & B., 1; *Knight v. Wiffin*, L. R., 5 Q. B., 600; *Casco Bk. v. Keene*, 53 Me., 108.)

ALLEN, J. The right of a party paying money to another under a *bona fide* forgetfulness or ignorance of facts, to recover it back from one who is not entitled to receive it, is well established. The equitable action for money had and received will lie against one who has received money which in conscience does not belong to him. (*Kelly v. Solari*, 9 M. & W., 54; *The Bank of Orleans v. Smith*, 3 Hill, 560.)

The doctrine has been applied, repeatedly, in cases analogous to the present. (*Bank of Commerce v. The Union Bank*, 3 Comst., 230; *The Continental National Bank v. The National Bank of the Commonwealth*, 50 N. Y., 575; *National Bank of Commerce v. National Mechanics' Banking Association*, 55 id., 211; *The Marine National Bank v. The National City Bank*, 59 id., 67.)

That the plaintiffs in this action paid to the defendant, professing to be the holder of the bill, the face of it, in ignorance of the facts disentitling the defendant to receive the same, is not disputed. Their right to recover the money

thus paid must be unquestioned, unless their right is barred by some circumstance which takes the case out of the general rule, or by some act of their own they have lost the right.

Certain general principles, applicable to commercial paper and regulating the rights and obligations of the several parties thereto, are very familiar and of every day application.

First. The plaintiffs, as drawees of the bill, were only held to a knowledge of the signature of their correspondents, the drawers; by accepting and paying the bill they only vouched for the genuineness of such signatures, and were not held to a knowledge of the want of genuineness of any other part of the instrument, or of any other names appearing thereon, or of the title of the holder. (*Kelly v. Solari, supra*; Broom's Legal Maxims, 257; *National Park Bank v. The Ninth National Bank*, 46 N. Y., 77; *Merchants' Bank v. State Bank*, 10 Wallace, 604; *Espy v. The Bank of Cincinnati*, 18 id., 604; *Goddard v. The Merchants' Bank*, 4 Comst., 147.)

Second. The defendant, as holder of the bill and claiming to be entitled to receive the amount thereof from the drawees, was held to a knowledge of its own title and the genuineness of the indorsements, and of every part of the bill other than the signature of the drawers, within the general principle which makes every party to a promissory note or bill of exchange a guarantor of the genuineness of every preceding indorsement, and of the genuineness of the instrument. (*Erwin v. Downs*, 15 N. Y., 575; *Turnbull v. Bowyer*, 40 id., 456; Story on Promissory Notes, §§ 135, 379, 380, 381.) The presentation of the bill, and the demand and receipt of the money thereon, was equivalent to an indorsement. The drawees had a right to act upon the presumptive ownership of the defendant as the apparent holder.

The facts which disentitled the defendant to receive the money, and in ignorance of which it was paid, were those presumed to be within the knowledge of the defendant and not of the plaintiffs. The defendant, in receiving the money



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Opinion of the Court, per ALLEN, J.

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and in disposing of it, did not act upon the faith of any admission by the plaintiffs, express or implied, of any fact which they now controvert in prosecuting this action. There was, therefore, no want of good faith, no negligence, or even want of ordinary care on the part of the plaintiffs in the payment of the money. The defendant, in the entire transaction, acted upon other evidence of its right to the money than the statement or actions of the plaintiffs, and in dealing with the bill and with the money, its avails, acted upon the apparent title and genuineness of the instrument, and the responsibility of those from and through whom it received the bill. The plaintiffs, therefore, owed no duty to the defendant in respect to the forgery, which invalidated the bill and its title to the moneys represented by it.

It follows that there could be no negligence on the part of the plaintiffs which could defeat their right to reclaim the money paid whenever the forgery and the consequent mistake in the payment were discovered. Owing no duty and making no misrepresentation, there was no estoppel to bar the action. The case is distinguishable from *The Continental National Bank v. The National Bank of the Commonwealth* (*supra*), in this, that in the case cited the officer of the bank pronounced a forged certification of a check to be genuine, upon which the payee of the check relied, as he had a right to do, and thus relying neglected to take the means then in his power to retrieve his position and save himself from loss. The court held that the circumstances created an equitable estoppel, and that the bank could not thereafter gainsay the genuineness of the certification which it had adopted and upon which the other parties had acted. It will be seen that this estoppel was based upon the admission of a fact peculiarly within the knowledge of the bank upon which the check was drawn, and which it was bound to know, and upon a positive assertion upon which the other party had a right to and did rely. In this case, as we have seen, the plaintiffs made no assertion of any fact within their knowledge, and the defendant did not act or forbear to act upon

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Opinion of the Court, per ALLEN, J.

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the faith of any thing which the plaintiffs said or did or omitted to say or do.

Again, in the case cited, had the teller of the certifying bank disclaimed the forged certification and pronounced it a forgery when presented, the holder of the check would have had ample time to arrest the swindler at the bank of the State of New York before, as the evidence showed, he had received the money on the gold checks, and before he went to the sub-treasury with his gold certificates.

In the case at bar, it is the merest conjecture, with scarcely a possibility to support it, that the defendant, or those from whom it received the bill, could at any time after the transmission of the foreign bill of exchange to Baltimore, have taken any effectual measures either for arresting the swindler or reclaiming the bill bought and paid for upon the credit of the bill. Estoppels cannot be based upon mere conjectures, even if a proper foundation is laid for them in other respects. There is nothing really in the case to distinguish it from *The National Bank of Commerce v. The National Banking Association* (*supra*), in which the plaintiff recovered.

Should this action be retried other questions may arise not presented by this record, growing out of the relations between the defendant and other parties, and the character in which the defendant acted, whether as agent or principal. Upon the present record the equities are with the plaintiffs. If they fail to recover, they lose the money absolutely and without legal fault on their part. If the defendant is compelled to reimburse the plaintiffs, it has its remedy over against the prior indorsers; and if they in turn have no remedy against the prior indorsers, it is because they have chosen to deal with irresponsible persons, or those of whose character and responsibility they were ignorant. It would be unjust to father the consequences of their method of dealing upon innocent third persons. But waiving the question as to the responsibility of the defendant for the genuineness of the instrument, and taking the most favorable view for the defendant, which is to regard it as the case of a mutual mis-

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Dissenting opinion, per MILLER, J.

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take, in respect to which neither was in fault, and in that view and upon that theory, the case is within the principles decided in *The Bank of Commerce v. The Union Bank* (3 Comst., 230); *The Kingston Bank v. Eltinge* (40 N. Y., 391), and the plaintiffs are entitled to a new trial.

Upon the case as made and upon the exceptions taken at the trial, I am of the opinion that the judgment should be reversed, and a new trial granted.

MILLER, J. (dissenting). The principle is well settled that money paid under a mistake of fact may be recovered back, although the party paying the same has been negligent in making the mistake, unless the payment has placed the other party in such a position as would render it unjust to require him to refund.

Having this doctrine in view the question arises whether the defendant was liable to refund the avails of the altered draft within the rule stated, under the circumstances presented in this case. The draft in question was accepted by the plaintiffs upon the seventeenth day of August, and it is claimed that the defendant, relying upon the plaintiffs' acceptance, lost the means and opportunity of stopping payment of the sterling bill of exchange which had been issued in lieu of the forged draft, by the plaintiffs' omission to inform the defendant of the forgery, and that the question of fact whether such a change of position had taken place as affected the defendant's rights, was properly submitted to the jury by the judge upon the trial. The charge assumed that both parties acted in good faith, and that negligence could not be imputed to either in dealing with the forged draft, and in this respect the judge charged substantially that if the defendant, upon being advised on the seventeenth day of August, could have taken precautionary measures which would have prevented it from sustaining this loss, then the plaintiffs could not recover. This rule as the case stood was not erroneous, and can be upheld within the authorities. Conceding that the acceptance of the draft falls within the rule, that by a

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Dissenting opinion, per MILLER, J.

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certification of a check the drawer is concluded only as to the signature of the drawee and his own certification, and that he is not bound to know the handwriting of the filling up, yet, when, by means of his omission to act, a loss is sustained, the party in fault shall bear that loss. This doctrine was upheld and is within the ruling in the case of *The National Bank of Commerce v. The National Mechanics' Bank* (55 N. Y., 211). In that case the check in controversy was altered after it was certified by raising the amount, and it was held that the sum paid could be recovered unless it was shown that the holder has suffered loss in consequence of the mistake. It is said in the opinion by Judge RAPALLO: "If the defendant had shown that it had suffered loss in consequence of the mistake committed by the plaintiff, as, for instance, if, in consequence of the recognition by the plaintiff of the check in question, the defendant had paid out money to its fraudulent depositor, then clearly to the extent of the loss thus sustained the plaintiff should be responsible." It appeared that the money was paid before the check was presented to the plaintiff, and that the loss had been fully incurred by the defendant before the plaintiff had made the mistake which it sought to have corrected. It will be observed that the case differs materially from the one at bar, for here the acceptance was made by the plaintiffs after the draft had been altered and not before, as in the case cited, and it cannot be doubted that the mistake committed by the plaintiffs by the recognition of the draft caused the defendant to pay the money. It was, therefore, a fair question for the jury whether the loss might not have been averted in season by notice of the forgery.

The case is also brought by the testimony within the distinction taken by some of the judges in *The Union Bank of Troy v. The Sixth National Bank of New York* (43 N. Y., 452), that where the defendant necessarily sustains loss by the mistake, unless notice in time to prevent such loss is given, no recovery can be had. It was not necessary to establish that the defendant relied entirely upon the plaintiffs' acceptance to entitle it to claim the benefit of an estoppel;

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Dissenting opinion, per MILLER, J.

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for even if, in consequence of it, he refrained from using means which he had in his power to prevent the loss finally sustained, the right of estoppel will be upheld and the loss must fall on the party who caused it. (*Continental National Bank v. National Bank of the Commonwealth*, 50 N. Y., 575.) The plaintiffs, by failing to take the means to advise the defendant, are brought directly within the rule that when the omission of a party affects the act of another, and he is thereby misled and influenced to his prejudice, the party in fault must bear the loss. The claim that the question submitted to the jury which has been discussed was not material, and that there was no evidence to guide the jury in determining it, is not well founded. It is not difficult to see that the draft given may have been stopped, the forger arrested, the acceptance in London have been prevented or some measures have been adopted which would have saved all parties from loss, if the defendant had been notified of the forgery, and it was proper for the jury to decide this question of fact.

While the instructions to the jury asked by the plaintiffs' counsel and refused contained legal propositions which were abstractly entirely correct in a proper case, neither of them were applicable to the question of fact, which was for the jury, and therefore each of them was properly refused.

There was no error in the admission of evidence or in any of the rulings upon the trial, and the judgment should be affirmed, with costs.

For reversal: ALLEN, RAPALLO, ANDREWS and EARL, JJ.

For affirmance: MILLER, J.; CHURCH, Ch. J., and FOLGER, J., not voting.

Judgment reversed

## Statement of case.

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| 64  | 326 |
| 119 | 800 |
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| 185 | 811 |
| 64  | 326 |
| 148 | 524 |

CYRUS LAWTON, Appellant, v. JAMES GREEN, Respondent.

An order of reference, under section 222 of the Code, to ascertain damages upon an undertaking given upon the granting of an injunction, cannot be regularly granted until judgment has been entered; but where the order is entered by plaintiff's consent this obviates the objection.

The limit of liability upon such an undertaking is the amount specified therein, and the court has no power to make any allowance beyond that amount for disbursements. Referee fees upon the reference are part of the damages, and recoverable as such.

Accordingly, *held*, that an allowance for disbursements and referee fees over and above the sum specified in the undertaking was error.

Such a proceeding is not a proceeding "in the action;" it is a proceeding after judgment, constituting no part of the action, and the court has no power to give costs therein.

The order in such proceedings should be limited to fixing the amount of damages, and a provision therein requiring the plaintiff to pay the same is improper. The amount of damages so ascertained is conclusive upon the parties and the sureties, but payment can only be enforced by action upon the undertaking.

(Argued January 25, 1876; decided February 25, 1876.)

APPEAL from an order of the General Term of the Supreme Court in the second judicial department, modifying an order of Special Term confirming the report of a referee, to whom it was referred to ascertain and report the amount of damages sustained by the defendant in consequence of an injunction issued in this action at the instance of the plaintiff. (Reported below, 5 Hun, 157.)

This action was brought to recover damages for trespass upon lands claimed by plaintiff, being the shore in front of Beach avenue, on Long Island Sound, and to restrain defendant from removing sand from said premises. A temporary injunction was granted restraining such removal and restraining any interference with or disturbance of the same.

Upon the granting of the injunction in this action, the plaintiff, with a surety, entered into an undertaking under section 222 of the Code. The amount specified in the undertak-

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Statement of case.

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ing was \$250, and the terms of the undertaking were, that the plaintiff would pay to the defendant such damages, not exceeding that sum, as he might sustain by reason of the said injunction, if the court should finally decide that the plaintiff was not entitled thereto. The original action was referred to a referee, who rendered a decision in March, 1871, that the complaint be dismissed, with costs. Thereupon, and on the 5th of April, 1871, no final judgment having then been entered in the action, an order was made with the consent of plaintiff referring it to a referee to ascertain and report what damages had been sustained by the defendant by reason of the injunction. The referee reported that he had ascertained and determined that the damages sustained by the defendant by reason of the injunction were \$750. The principal item of damage was the clogging up the mouth of a drain opening on the premises. On the coming in of this report of the referee, an order was made confirming the same, and assessing the damages sustained by the defendant by reason of the injunction at \$750, with ten dollars costs of the motion, and \$380.38 for the disbursements and referee's fees paid on the reference; and it was ordered that the plaintiff pay to the defendant the amount within thirty days after the service upon him of a copy of the order. The General Term modified the order by reducing the amount of damages to \$250.

Further facts appear in the opinion.

*N. D. Lawton* for the appellant. No assessment of damages was proper until judgment had been entered. (2 R. S., 370; *Wickes v. Southwicks*, 12 How. Pr., 170; *Sherman v. N. Y. Mills Co.*, 11 id., 269; *Leavitt v. Dabney*, 9 Abb. Pr. [N. S.], 373, 384; *Meth. Ch. v. Barker*, 18 N. Y., 465; Hoffman on Referees [ed. 1875], 134.) The undertaking was the only authority or foundation for the assessment of damages against plaintiff or his sureties. (*Cayuga Bridge Co. v. Magee*, 2 Paige, 116, 122; affirmed, 6 Wend., 85; *Leavitt v. Dabney*, 40 How. Pr., 277-284; 9 Abb. [N. S.], 373-383; *Garcia v. Sheldon*, 3 Barb., 232; *Lawton v. Green*, 5 Hun, 157; *Pat-*



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Opinion of the Court, per CHURCH, Ch. J.

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*terson v. Bloomer*, 9 Abb. Pr. [N. S.], 27, 34.) The court could not order the payment of a greater sum than the amount stipulated in the undertaking. (*Hovey v. Rub. Tip Pencil Co.*, 6 J. S., 428.)

*Samuel Hand* for the respondent. The court had power to make the order of reference. (*Bangs v. Duckinfield*, 18 N. Y., 597; *Burkle v. Chapin*, 53 Barb., 488; 53 How. Pr., 155.) Plaintiff, by consenting to the order, waived any legal objection he might have had. (1 Hoff., 1; 18 N. Y., 592; *Pitt v. Davison*, 37 id., 235; 20 id., 62; *Waterberry v. Wood*, 29 How. Pr., 404; *Fisher v. Hepburn*, 48 N. Y., 1; Wil. Eq. Jur., 48.) The notice of discontinuance served by plaintiff showed that the action had been finally decided and the order of reference was properly made. (*Carpenter v. Wright*, 4 Bosw., 656; *Task v. Smith*, 19 How., 414; *Crocket v. Smith*, 14 Abb., 62; *Coats v. Smith*, 1 Duer, 664; *Mut. L. I. Co. v. Roberts*, 4 Sandf., 592; *Cumb. C. Co. v. Hoffman*, 39 Barb., 16.) The court could award to defendant the damages it ascertained he had sustained by reason of the injunction. (*Bangs v. Duckinfield*, 18 N. Y., 596; *Leavitt v. Dabney*, 9 Abb. Pr. [N. S.], 378; *Patterson v. Bloomer*, 37 How. Pr., 454.) Plaintiff's liability was not limited to the sum specified in the injunction. (Edwards on Referees, 227; *Powell v. Walworth*, 2 Mad. Ch., 183.)

CHURCH, Ch. J. The consent of the plaintiff to the order of reference obviates the objection that judgment had not then been entered. An order to ascertain damages is not regular until the judgment has been entered, but as the judgment was entered immediately after, the irregularity was formal and was waived by the consent to the entry of the order of reference.

The referee has not reported the items of damage which he awarded nor the facts or conclusions of law upon which his award was based. We are, therefore, required to give his finding the most favorable intendment. The plaintiff might



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have compelled a more explicit finding. It is, to say the least, doubtful whether the injunction prevented the defendant from opening the mouth of the drain. The action was brought to restrain the defendant from removing sand from the beach, and a temporary injunction restrained such removal during the pendency of the action. Although the general words were used restraining the defendant from interfering with or disturbing the sand, yet looking at the objects and purposes of the action and the injunction, it would be difficult to hold that such a disturbance, as the removal of drift and sand from the mouth of the drain would be a violation of the injunction.

It appears that after the storm which filled up the mouth of the drain, the defendant applied to the plaintiff for a modification of the injunction to enable him to open it, and there is a direct conflict of evidence between the plaintiff and defendant as to what took place. The defendant testified that the plaintiff in substance claimed that the injunction restrained the opening of the mouth of the drain and refused to modify it, while the plaintiff testified that he told the defendant that the injunction did not restrain such opening, but if it did, that he would give him a stipulation to allow him to do it, which the defendant refused to accept.

We must assume that the referee decided in favor of the version of the defendant. If so, he had the opinion of both parties that such would be the effect of the injunction, which, in connection with the general language employed, would perhaps justify him in holding accordingly. In the absence of specifications by the referee, we cannot say that there were no damages sustained in consequence of the injunction, if the construction above indicated is given to it. There is evidence tending to show that the drain was liable to be filled up by the action of the water, and the defendant had been in the habit of opening it, and as we must presume, had the right to do so, and if he was prevented by the injunction, some damages would be caused thereby, and it is impossible to determine \$250 is excessive.

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Opinion of the Court, per CHURCH, Ch. J.

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The General Term reduced the damages to \$250, the amount specified in the undertaking, and modified the order accordingly, but affirmed that part of the order which required the plaintiff to pay, in addition to the \$250, the sum of \$380.38, for disbursements and referee's fees paid by the defendant upon the reference to ascertain the damages; this allowance was ratified upon the ground that the court had power against the plaintiff in the action "to award the costs of any proceedings in the action." I think the learned judge erred in assuming that this was a proceeding "in the action;" the action was at an end; final judgment had been entered therein. The reference was had in pursuance of section 222 of the Code, requiring an undertaking to be given upon granting an injunction, and providing for ascertaining the damages, by reference or otherwise, as the court shall decide. This proceeding constituted no part of the action. The section of the Code referred to was adopted as a substitute for the thirty-first rule of the Court of Chancery. Until that rule was adopted, the court had no power to award damages against a party for an injury occasioned by an injunction, even though it was determined in the action that the party was not entitled to it. Hence, neither the party nor his sureties are liable beyond the amount specified in the undertaking. (*Leavitt v. Dabney*, 4 Abb. Pr. [N. S.], 373; 2 Paige, 116; 3 Barb., 232; 40 How. Pr., 280.) We were referred to the general language in High on Injunctions (§ 962), that independent of statutory enactments, a court of equity has power, upon the dissolution of an injunction, to ascertain the damages and decree their payment. The authorities cited do not sustain the broad proposition laid down. The principal authority cited is *Sturgis v. Knapp* (33 Vt., 486), which proceeds upon the theory that when the court grants an injunction upon condition that the party gives certain security, jurisdiction is derived from the order, the condition impliedly being that the party shall pay all damages sustained, and that the bond is cumulative. Whether a special condition of this character might be made, which could be enforced by

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Opinion of the Court, per CHURCH, Ch. J.

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the court, need not be considered. No such condition was inserted in the order nor can it be implied. The security required is provided for by statute. The court or judge fixes the amount, and the undertaking may be executed by the party alone or with sureties, and in either case, the measure of liability is the amount specified, and beyond that amount the court has no power to award damages. An action will lie against a plaintiff for all damages sustained, but it must be in the nature of, and have the elements of an action for malicious prosecution. (*Cox v. Taylor*, 10 B. Monroe [Ky.], 17.) But I can find no legal authority for sustaining any allowance upon this proceeding, beyond the sum specified in the undertaking. If we regard this as a special proceeding in which, by the act (chapter 270, Laws of 1854), the court may award costs in its discretion, we are met with the difficulty that the whole liability for damages is limited to the sum named. The expenses incurred on such a reference are a part of the damages, and may be recovered as such. (*Aldrich v. Reynolds*, 1 Barb. Ch., 613.) It follows that the item for disbursements cannot be sustained. The form of the order is also objectionable. It should be confined to fixing the amount of damages. When so ascertained, the amount is conclusive, both upon the party and his sureties, but payment can only be enforced by action upon the undertaking. The Code does not authorize the court to enforce payment by order, but only to ascertain the damages. The proper way is to limit the order to an adjudication upon the amount of damages, which amount must not exceed the sum named in the undertaking.

The order must be modified, so as to fix the damages by reason of the injunction at the sum of \$250, without costs to either party in this court.

All concur.

Ordered accordingly.

## Statement of case.

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| 64  | 339 |
| 127 | 431 |

JOHN HEERMANS, Trustee, etc., Appellant, v. ALMON H. ROBERTSON et al., Respondents.

One F., in October, 1868, executed an instrument under seal, which, by its terms, conveyed to plaintiff certain real and personal estate, with power to sell and convey the lands "by retail for the best price that can be got," and, until such sale, to rent such of them as could be rented, and after defraying expenses and retaining five per cent for commissions, to pay over to F. the residue of the avails received during his life, and upon his death, after payment of his debts, to distribute the residue in the manner and to the persons specified. In December, 1870, F. executed to defendant R. a written contract for the sale to him of certain premises, part of the real estate included in said instrument, and R. went into possession under said contract. F. died in April, 1873. In an action to recover possession of the premises contracted to R., *held* (EARL, J., dissenting), that conceding plaintiff became seized under the instrument of an estate in the lands in trust for leasing with power of sale, as F. was entitled to receive to his own use all receipts from sales during his life, and as he could have compelled an execution of the trust by a sale, he having, instead of resorting to a court of equity for that purpose, made a sale, thus accomplishing the same result, R. not being in default, was in equity entitled to hold the premises as against plaintiff.

Also, *held* (ALLEN, J.; ANDREWS and MILLER, JJ., concurring; EARL, J., dissenting), that no express trust was created by the instrument to come into effect at the death of F. As to whether an express trust was declared for any of the purposes for which by law such trusts may be created, *quære*.

An intent to create an express trust will not be presumed in the absence of an express declaration to that effect, where the whole purpose of the deed, without peril to the rights of any one, can be accomplished under a power conferred by the deed.

The object of the provisions of the statute of uses and trusts, limiting express trusts, was to restrict them to cases in which it is necessary, for the protection of those interested, that the title or possession should vest in the trustee. Where no such necessity exists, the intent was that the trust should be executed as a power. (ALLEN, J.; ANDREWS and MILLER, JJ., concurring; EARL, J., dissenting.)

The object of the provision of the Revised Statutes (1 R. S., 728, § 55), authorizing an express trust to sell lands for the benefit of creditors, was to legalize a trust under an assignment for the benefit of creditors, where there is a necessity that the estate should pass. No such necessity exists in case of a trust created by deed to take effect at the death of

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Statement of case.

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the grantor, as the interests of all are effectually secured by construing the trust as a power. (ALLEN, J.; ANDREWS and MILLER, JJ., concurring; EARL, J., dissenting.)

To effect a change in the order of marshaling assets for the payment of debts, there must be a positive direction clearly indicating an intent to relieve the class of assets primarily liable, and to charge some other portion of the estate therewith. A general direction for the payment of debts is not sufficient.

Accordingly, *held* (ALLEN, J.; ANDREWS and MILLER, JJ., concurring; EARL, J., dissenting), that by the instrument in question the property, the subject of the power, not being charged with the payment of debts, except as all the property of the deceased debtor is charged in its equitable order, and there being no conveyance of the property subject to the payment of debts so as to charge him as grantee *cum onere*, an intent to create a trust for the payment of debts could not be implied.

(Argued January 28, 1876; decided March 21, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, denying a motion for a new trial and directing judgment in favor of defendant upon an order nonsuiting plaintiff on trial.

This was an action of ejectment, to recover possession of certain premises situate in Steuben county. Plaintiff claimed title and a right to the possession under an instrument in writing, executed by Joseph Fellows, of which the following is a copy :

“Whereas, I, Joseph Fellows, of Corning, in the county of Steuben and State of New York, from infirmities and advanced age deem it expedient to convey to my nephew John Heermans, of Corning, aforesaid, my real and personal estate in the States of New York, Pennsylvania, Michigan, Wisconsin, Indiana, Ohio, Illinois and West Virginia, as trustee for the purposes herein stated. Now, therefore, I the said Joseph Fellows, in consideration of the premises, and also of one dollar to me paid by the said John Heermans, the receipt of which is hereby acknowledged, have sold, and by these presents do grant, release and convey unto the said John Heermans, his heirs and assigns forever, all my real and personal estates situate in the several States aforesaid, to have and to hold the

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Statement of case.

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same to the said John Heermans, his heirs and assigns forever; provided always, that the said John Heermans shall sell the said granted lands by retail for the best price that can be got for the same, and convey them in fee simple to purchasers with covenants of warranty binding my heirs to warrant and defend the title to the lands so to be sold and conveyed; and until such lands shall be sold as aforesaid, he shall rent such of them as can be rented for the best price that can be got. He shall collect all debts owing to me, and execute deeds as aforesaid for all lands now under contract of sale on payment of the debts owing on them respectively. The avails of the said real and personal estate shall be paid, distributed and disposed of as follows: First, to defray the expenses of this trust, to wit, five per cent commission on all moneys received and paid out, and all necessary and reasonable expenditures and charges in and about the execution of the trust, including local agencies. Secondly, during my life the residue of all moneys received shall be paid over to me or appropriated to my use under my directions. Thirdly, after my decease, and after the payment of all my just and legal debts, and the expenses of the trust aforesaid, the residue shall be distributed as directed in a writing supplementary to this deed to be executed by me hereafter; or in case such writing shall not be executed, then the residue shall be distributed to my heirs according to the laws of the State of New York, and I authorize and direct the said John Heermans, in his discretion, to compromise any disputed claims, and also to make abatement in debts when the security is insufficient or doubtful.

“In witness whereof, I, the said Joseph Fellows, have hereunto set my hand and seal on the 10th of October, 1868.

“JOSEPH FELLOWS.” [L. S.]

On the 16th of October, 1868, Fellows executed and delivered to plaintiff another instrument under seal, in and by which directions were given as to the manner of distribution and the persons to whom distribution of the residue remaining after Fellows' death, and after payment of debts and expenses should be made.

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Statement of case.

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It appeared that defendants were in possession of the premises in question, which were part of the real estate owned by Fellows at the time of the execution of said instruments, under a contract of sale from said Fellows dated December, 16, 1870. Fellows died April 29, 1873, before the commencement of this action. At the close of the case defendants' counsel moved for a nonsuit upon the ground that plaintiff had shown no title to the premises, and that the right of plaintiff under said instruments terminated at the death of Mr. Fellows. The motion was granted, and plaintiff's counsel duly excepted. Exceptions were ordered to be heard at first instance at General Term.

*A. Hadden* for the appellant. The instruments in question created a valid trust, and vested the title to the premises in plaintiff. (*Wright v. Miller*, 4 Seld., 22; *Aub. Sem. v. Kellogg*, 16 N. Y., 83; *Pruden v. Pruden*, 14 Ohio [N. S.], 251; *Terry v. Wiggins*, 47 N. Y., 512; 2 Lans., 272; 1 R. S., 723, §§ 13, 26; *id.*, 773, title 4, § 2; *Kane v. Gott*, 24 Wend., 661, 662; *Phelps v. Phelps*, 28 Barb., 121, 144, 145; 23 N. Y., 69; *Van Epps v. Van Epps*, 9 Paige, 237; *Greenfield's Estate*, 2 Har. [Penn.], 495; *In re Livingston*, 34 N. Y., 555; *Fero v. Ferro*, 9 How. Pr., 85; T. & B. Law of Trusts, 42-44, 209, 215, 500; *Rome Ex. Bk. v. Eames*, 1 Keyes, 588; 1 R. S., 748, § 2, title 5; *Post v. Hover*, 30 Barb., 312, 320; 33 N. Y., 600; *Campbell v. Low*, 9 Barb., 585, 593; *Tobias v. Ketchum*, 32 N. Y., 319, 330; *Leggett v. Perkins*, 2 Comst., 317; *Vernon v. Vernon*, 53 N. Y., 351, 359; *Van Vechten v. Van Vechten*, 8 Paige, 120; *Dillaye v. Greenough*, 45 N. Y., 438, 444; *Amory v. Lord*, 9 *id.*, 403, 420; *Dupree v. Thompson*, 4 Barb., 279, 284; *Manice v. Manice*, 43 N. Y., 303, 364; *Knox v. Jones*, 47 *id.*, 396; *Noyes v. Blakeman*, 2 Seld., 567, 589; *Savage v. Burnham*, 17 N. Y., 561, 567, 568; *Leggett v. Hunter*, 19 *id.*, 445, 454; *White v. Howard*, 52 Barb., 294, 300, 316.) Suspense of the power of alienation is not essential to the validity of a trust to receive the rents and profits. (*Boynton*



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v. *Hoyt*, 1 Den., 53; *Fellows v. Heermans*, 4 Lans., 230, 336, 337; *Lang v. Ropke*, 5 Sand., 369; *Kane v. Gott*, 24 Wend., 662; *Cruger v. Jones*, 18 Barb., 471; *Coster v. Lorillard*, 14 Wend., 303; Smith's Com., 821; 4 Kent's Com., 320, 321; *Doane v. Phillips*, 12 Pick., 223, 226; *McLean v. McDonald*, 2 Barb., 534; *Belmont v. O'Brien*, 12 N. Y., 394; *Marvin v. Smith*, 56 Barb., 600; 46 N. Y., 571, 576; *Fitzgerald v. Topping*, 48 id., 438; *Duvall v. Eng. E. L. Church*, 53 id., 500; id., 351; 43 id., 303; 32 id., 319; *Gallie v. Eagle*, 65 Barb., 583; *Leggett v. Perkins*, 2 N. Y., 307, 314; *Brown v. Brown*, 3 Keyes, 345.) The trust did not terminate with the death of Mr. Fellows, but the title of the lands unsold remained in plaintiff for the purposes of the trust. (Stat. of Powers, §§ 79, 105; 1 R. S., 735; *Jackson v. Edwards*, 22 Wend., 498, 508; *Tobias v. Ketchum*, 32 N. Y., 389; *Wright v. Delafield*, 23 Barb., 517; *Foster v. Coe*, 4 Lans., 56; *Kissam v. Dinkes*, 49 N. Y., 605; Hill on Trustees, 231, 347; *Merthwaite v. Jenkinson*, 2 B. & C., 357; 1 Jarm. Pow. Dev., 224, n; *Wykham v. Wykham*, 18 Ves., 395, 413, 414; *Goodtitle v. Knott*, Coop., 43; *Hawker v. Hawker*, 3 B. & Ald., 537; *In re Savings Trust*, Law R., 1 Eq., 416; *Miller v. Miller*, 1 Eng. R., 672; L. R., Eq. Cas., 263; *Hawley v. James*, 5 Paige, 461.) A trust for the payment of debts is valid. (*Rogers v. Tully*, 20 Barb., 641; § 65 Stat. Uses and Trusts, subds. 1, 2; *Belmont v. O'Brien*, 12 N. Y., 404.)

*Geo. B. Bradley* for the respondents. The instrument of October 10, 1868, vested no title in plaintiff unless it created an express trust within 1 Revised Statutes, 728, section 55. (*N. Y. D. Dock Co. v. Stillman*, 30 N. Y., 194; *Downing v. Marshall*, 23 id., 379; *Yates v. Yates*, 9 Barb., 340, 341.) No such trust was created. (*Wright v. Delafield*, 23 Barb., 516; *Hotchkiss v. Etting*, 36 id., 44; *Downing v. Marshall*, 23 id., 379; *Sterrick v. Dickinson*, 9 id., 518; *De Peyster v. Clendenning*, 8 Paige, 304, 305; *Leggett v. Perkins*, 2 Comst., 306; *Boynton v. Hoyt*, 1 Den., 57, 58;



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*Hawley v. James*, 16 Wend., 160; 5 Paige, 318; *Lang v. Ropke*, 5 Sandf., 369; *Kane v. Gott*, 24 Wend., 662; *Arnold v. Gilbert*, 5 Barb., 198; *Selden v. Vermilyea*, 1 id., 58; 1 R. S., 730, §§ 65, 96, 734.) Even if this instrument vested a power in trust under the statute, it vested no title or right to possession in plaintiff. (1 R. S., 729, §§ 58, 59; *N. Y. Dry Dock Co. v. Stillman*, 30 N. Y., 194; *Clarke v. Crege*, 47 Barb., 599.) This deed was merely a power of attorney. (1 R. S., 727, 728, §§ 47, 49; 1 Seld., 456-460; 23 N. Y., 379; 36 Barb., 38; 9 id., 516, 518; 5 Sandf., 374, 375; *McDonough v. Loughlin*, 20 Barb., 238, 245; 1 R. S., 735, § 108; id., 738, § 134.) Whatever trusts and powers were created by this deed terminated on the death of Mr. Fellows. (1 R. S., 730, § 67; *Sterricker v. Dickinson*, 9 Barb., 516, 520.) The instrument of October 15, 1868, was ineffectual for any purpose, and void. (*Fellows v. Heermans*, 13 Abb. [N. S.], 15; 1 R. S., 728, § 49; id., 723, § 13; 13 id., 725, § 35; *Rawson v. Lampman*, 1 Seld., 456, 460; *Wright v. Miller*, 4 Barb., 611, 614; 4 Seld., 22; *Helmer v. Shoemaker*, 22 Wend., 137; *Sheridan v. House*, 4 Keyes, 587; *Hill v. Hill*, 4 Barb., 427; *Tyson v. Blake*, 22 N. Y., 560; *Norris v. Beyea*, 3 Kern., 273; *Freeborn v. Wagner*, 4 Keyes, 27; *In re Diez*, 50 N. Y., 88.)

ALLEN, J. Whether, during the life of Joseph Fellows, the original owner of the property in question, the plaintiff was possessed of an estate in the property conveyed by the deed of the 10th of October, 1868, entitling him to the possession, or whether that instrument conferred upon him a mere power in trust, is not material to be considered upon this occasion. If a trust was created by the instrument referred to and the estate vested in the plaintiff as trustee, it was a trust for leasing the lands and paying over the rents to Fellows, the creator of the trust, during his life, and terminated at his death, before the commencement of this action.

With the termination of the trust the estate of the trustee ceased. That the deed or instrument under which the plain-

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tiff claims title is very inartificially drawn and ambiguous in its terms, leaving much to be spelled out as to the actual purpose of the transaction and the intent of the parties is very obvious. The instrument has been frequently before the courts for interpretation, and there has been a wide diversity of opinion as to its true interpretation and effect. Some judges have held that by it a valid trust was created for the leasing of lands during the life of Mr. Fellows. Others have held that a mere power in trust was created in the plaintiff for the purposes mentioned in the deed, while others have been of the opinion that the instrument was but a warrant of attorney from Fellows to the plaintiff, revocable at the pleasure of the former.

If it should be conceded, for all the purposes of this action, that the plaintiff became seized under the deed of an estate in the lands in trust for leasing with the power of sale, there would still be a grave question whether he could recover of the defendant in the action. During the life of Fellows, the original owner of the property and the author of the trust, he was the sole *cestui que trust* entitled to receive to his own use all receipts from sales; and those entitled under the deed, after his death, had and could claim no interest in that part of the trust property which during the life of Fellows should be converted into money. The plaintiff, if trustee, had no discretion as to the time of sale, but was bound to sell within a reasonable time, for the best price that could be obtained. He could not, to the prejudice of the *cestui que trust* for life, defer a sale with a view to a prospective rise in value, or to benefit those who should become entitled after the death of the life tenant. The direction of the deed is to sell the lands, "by retail, for the best price that can be got for the same;" that is, the best price that could then be had for the same. The deed looked to a conversion into money as soon as sales could be made and during the life of Fellows, so far as practicable. The author of the trust deemed himself entitled to and entirely competent to care for and dispose of the proceeds of the sales that should be

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realized during his life; and the provision for those who should come after him was only in respect to the lands that should remain unsold and the fruits of sales not realized at the time of his death.

It was not intended, and a court of equity will not allow a trustee of such a trust or of any trust, by postponing or accelerating a sale, to affect the interests of successive *cestuis que trust*. By so doing a trustee could, by fraud or collusion, defeat the intention of the trust and deprive the rightful owner of his just rights. (*Hawkins v. Chappel*, 1 Atkyns, 621; *Walker v. Shore*, 19 Ves., 387.) Fellows, the author of the trust, who was also the *cestui que trust* for life, entitled to have sales made when they could be made at the best price and within reasonable time, lived four and a-half years after the execution of the deed, and could, during that time, have compelled an execution of the trust by a sale of the lands, or such of them as could be sold. Instead of resorting to a court of equity to put the trustee in motion, he made sale of the *locus in quo* to the defendant Robertson, and, so far as appears, for the best price to be obtained, and received the avails, to which he would have been entitled had the sale been made in form by the plaintiff and the money received by him. Had Fellows found a purchaser for a proper price, he could have compelled the plaintiff to sell and pay to him the proceeds. The same result has been accomplished, and Fellows has received that to which he was entitled; and the defendant Robertson is, in equity, entitled to hold the premises as against the plaintiff, who, at most, during the life of Fellows, was a trustee invested with power to sell for his benefit and pay the proceeds to him; so that an equitable defence to the action is made out.

It is true that the interest of Fellows in the property during his life, and the fact that he was entitled to and could have compelled a sale of the property and every part thereof for his benefit during his life if proper prices could have been obtained for the same, is not entirely consistent with the idea that there was a valid trust for a leasing of the premises

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during his life. Such a trust would seem to imply, if not inalienability of the lands held in trust, at least, that upon any sale or transfer of the property, the proceeds, or avails, should be held upon a like trust, and the income only paid to the life tenant. This, however, we do not pass upon.

Were it necessary to decide the question, I should have great difficulty in finding an express trust declared for any of the purposes for which by law such trusts may be created. The only purpose recognized by the statute of uses and trusts, of which there is the least intimation in the instrument, has respect to the rents and profits of the lands and their receipt and application to the use of Mr. Fellows, the owner of the lands, during his life. An express trust may be created for such purpose, but for no other purpose, included within the powers conferred upon the plaintiff. (1 R. S., 728, § 55.)

The main purpose of the instrument was to relieve its author from the burthen of managing the portion of his estate embraced within its terms, and create an agency for that purpose, and it was during the life of Fellows, in substance and effect, but an agency for the sale of the real property mentioned and the collection of the debts owing to Fellows for lands then under contract of sale, and for the payment of all the avails and proceeds to Fellows, the owner, who never parted with his property in or his rights to the income of, or the avails of the sales of any part of the property. The whole purpose of the instrument might have been accomplished during the life of Fellows, by a sale of the property and the payment of the proceeds to him. In that event those coming after him would have taken no benefit under it. The authority to covenant in respect to the title in behalf of Fellows and his heirs was a simple warrant of attorney for that purpose, and the power under it terminated with the life of Fellows; so that it is difficult to assign a place to the instrument, either as a conveyance or a warrant of attorney, or as creating a power in trust. The sale of the lands was the principal object of the transaction and of the agency, and for that purpose a trust could not be created. How much or how

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little of the property was productive or could be made productive by way of rent does not appear; probably but a small portion could be rented, and the renting of that was subsidiary and secondary to the main purpose of the deed. The authority to rent did not embrace all the lands mentioned, but only such as could be rented and occupied by a tenant, *i. e.*, such as in the usual course of things would be regarded as the proper subjects of a demise, and for such short terms as should not interfere with the more important purpose, the sale of the lands.

This power to lease and to collect and pay over the rents could be exercised under a naked power of attorney or a power in trust, and under the same authority by which the sales should be made. There was certainly no trust created in respect to lands which were not the proper subjects of renting, and so far as the estate and interest of the parties to the deed are concerned, the instrument cannot properly be held to have created an express and active trust, vesting the title and possession in the trustee of a portion of the premises, and to have simply conferred upon him either a naked power or a power in trust as to other lands, all included in the same general terms. This would be to establish a trust not as created in terms by the instrument, but by proof of extrinsic facts which would have authorized the creation of an express trust. But without definitely passing upon this question, which is not involved in this action, and upon the decision of which the rights of other parties not before the court may depend, we pass to the consideration of the question whether a trust was created to come into existence at the death of Fellows.

The deed or instrument, while it provided for the management of the estate by the plaintiff for the exclusive benefit of Fellows, the owner, during his life, sought to provide for the disposition and distribution of it after his death, which should take the place of, and serve as substitute for a testamentary disposition. It declares that after the decease of Fellows, and after the payment of all his just and legal debts

and the expenses of the trust, the residue should be distributed in the manner and to the persons especially mentioned. It is urged that by this clause an express trust was created and existed from the death of Mr. Fellows, to sell lands for the benefit of creditors, which is one of the purposes for which an express trust may be created. (1 R. S., 728, § 55.) The reason for retaining this trust among the few express trusts allowed by statute is obvious. The intention was to legalize a trust under an assignment for the benefit of creditors, which would in most cases be entirely defeated, if the title were to remain in the debtor; and there is an evident distinction between a trust to sell, created by deed and to be operative during the life of the grantor, and a similar trust created by devise or by deed to take effect at the death of the grantor. In the former case there is a necessity that the estate should pass, but in the latter no such necessity exists. By construing the trust as a power the interests of all are as effectually secured as if the legal estate passed to the trustees. On the death of the grantor or testator the power attaches immediately on the land, and nothing can be done to defeat its execution. The object of the revisors in the radical changes effected in the law of uses and trusts was to limit and restrict express trusts to cases in which it was necessary, for the protection of those interested, that the title or possession should vest in the trustees. Where no such necessity existed, the intent was that the trust should be executed as a power, and without vesting the legal title or possession in the trustees. (Revisers' Notes, 5 Stat. at Large, 322 *et seq.*)

There is no express trust created for the sale of lands for the payment of debts by the instrument under consideration. If one is established, it must be by interpretation of the doubtful phraseology of a crude and imperfect document, and without necessity for its existence, and when all could be accomplished under a power. The power to sell may exist with authority to pay debts from the avails, but if an express trust exists it is not the direct creature of the instrument itself, but it must be judicially established upon proof of the

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existence of debts for the payment of which a trust might have been created. Constructive and implied trusts are not abolished. They may be implied or presumed from the supposed intention of the parties and the nature of the transaction, or they may be raised independently of any such intention, and forced on the conscience of a trustee when necessary to prevent a fraud. But an intent to create an express trust will not be presumed in the absence of an express declaration to that effect when the whole purpose of the deed, without peril to the rights of any person, can be accomplished under a power conferred by the deed.

There is not even an express direction to the plaintiff to pay the debts of Fellows, still less does he take title subject to their payment; nor are they charged upon the property which is the subject of the power delegated to the plaintiff. The instrument does not profess to dispose of all the property of Fellows, and does not put at the control of the plaintiff the large amounts received to his use and paid to him during the five years of the continuance of the power before his death.

The clause, "and after the payment of all my just and legal debts," preceding the directions for distribution of the residue of the property included within the power, comes far short of making that property the primary fund for the payment of the debts, or directing their payment from it. It is at the most but an intimation and direction that the disposition of his property then made shall not interfere with the just claims of creditors, whether their debts were created before or after the execution of the instrument. It did not work any change in the order in which his property should be appropriated to the payment of his debts as prescribed by law. The personal representatives of Mr. Fellows will be charged, and notwithstanding the execution of this instrument are charged, with the payment of his debts from personal assets in their hands. Personal estate is to be first exhausted in the discharge of debts, including at common law the payment of debts with which the real estate is



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charged by mortgage. By statute, in this State, heirs and devisees are required to satisfy mortgages upon property devised or descending to them. (1 R. S., 749, § 4.) The order of marshaling assets for the payment of debts is to apply, first, the general personal estate; second, estates specifically devised for the payment of debts; third, estates descended; fourth, estates devised, though generally charged with the payment of debts. (2 Williams on Ex., 1526, note 2; *Livingston v. Newkirk*, 3 J. C. R., 312; 4 Kent's Commentaries, 420.) In order to effect a change in the order there must be some absolute and positive direction, clearly indicating an intent to relieve the class of assets primarily liable, and to charge some other portion of the estate in exoneration of the funds and property primarily liable. A mere direction to an executor to sell real estate does not make the proceeds necessarily liable as personal assets; but they will be only applicable to the payment of debts when the assets personal in their character shall have been exhausted.

Heirs and devisees (and the donees under this power may be regarded as occupying the same position) can only be charged in respect to lands coming to them, or the lands themselves charged with the payment of debts, upon proof that there are no assets, personal or otherwise, applicable in the first instance to their payment. (2 R. S., 450 *et seq.*; *Schermerhorn v. Barhydt*, 9 Paige, 28.) A general direction in a will for the payment of the testator's just debts, is not the express direction which the statute requires to change the statutory order of marshaling the assets of a testator; and the construction and effect of such a direction must be the same whether found in a will, deed or other instrument. (*Rapalye v. Rapalye*, 27 Barb., 610; *Kinnier v. Rogers*, 42 N. Y., 531; *Skinner v. Quin*, 43 id., 99.) In the case last cited, R., by will, after the payment of all his lawful debts, gave to his executor all his estate, real and personal, upon certain trusts, with a devise over of all the rest and residue of his estate to his wife, with authority to his executor to sell and convey his real estate after the death of his



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mother, and pay over the proceeds to his wife. This court held that the power to sell was valid as a power in trust and not as an express trust. *Galton v. Hancock* (2 Atk., 424, 430) was twice argued, and upon the second argument Lord HARDWICKE, after holding the case for twelve months under advisement, reversed the decision which he had first made. The question was whether the devisee of an estate incumbered by a mortgage was entitled to have the estate exonerated out of the real assets which descended upon the heirs, and upon the second argument it was held she was, notwithstanding the testator in his will set out with the desire that all his debts should be paid in the first place, and concluded with a general residuary devise to the defendant, who asserted the claim that the mortgage debt should be satisfied from the assets which went to the heir. It was claimed there, as here, that the introductory clause directing the payment of debts was sufficient to charge the incumbrance upon the estate devised, and that the devisee took it *cum onere*. But this claim was disallowed, and the rule established in equity for the marshaling of assets was applied.

The property itself, the subject of the power to the plaintiff, not being charged with the payment of the debts except as all the property of the deceased debtor is charged in its equitable order, and there being no conveyance of the property to the plaintiff, subject to the payment of the debts so as to charge him as a grantee *cum onere*, an intent to create a trust for the payment of the debts from this particular property cannot be implied. Had there been a trust created for the payment of debts the trust fund would by such act have been made the primary fund for that purpose, and to raise such a trust by implication or by judicial interpretations would be to change the order in the marshaling of assets, without and against the sanction of the party who alone can change the equitable rule on that subject, and transfer the charge from one class of property to another. This was not a grant of property to pay debts, but at most a grant of an estate which might, if there should be a deficiency of other

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assets, be charged with their payment. Whether there was a valid power in trust created in the plaintiff by the instrument under consideration, it is not necessary to determine, for such a power would not give the plaintiff a title to or right of possession of the property, but the same would go to the heir or other party entitled, subject to this power. It is sufficient for all the purposes of this action that at the time of its commencement the plaintiff was not, as the trustee of an express trust, entitled to the possession of the premises.

The judgment should be affirmed.

EARL, J. (dissenting). In the view I take of this case, it will not be necessary to consider the force and effect or to determine the validity of the instrument executed by Fellows on the 15th day of October, 1868, and I will confine my attention to the prior instrument executed October tenth. I will first consider what Fellows intended by that instrument, and then whether that intention can have effect under our laws.

It was his evident intention to vest the title to all the property conveyed in the trustee. He had become old and infirm, and the management of his large estate, located in eight different States, had probably become irksome and harassing to him. He therefore says, that, on account of his infirmities and advanced age, he deems it expedient to convey all his property to his nephew, and he uses apt and proper terms to convey title. He acknowledges a consideration of one dollar, and uses the terms "have sold, and by these presents do grant, release and convey," terms appropriate and ample to convey the fee to real estate. The terms of the trust also show that the grantor must have understood that the title to the property was by the instrument vested in the trustee. It was provided that the trustee should sell the lands by retail for the best price that could be obtained, and convey the same in fee simple to purchasers, with covenants of warranty binding his heirs; that until the lands should

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be sold he should rent such of them as could be rented for the best prices he could obtain; that he should collect all debts, execute deeds of all lands then under contract, and pay, distribute and dispose of the avails of the real and personal estate as follows: First, to defray the expenses of the trust; secondly, to pay over to Fellows during his life, or appropriate to his use under his direction, all the residue of moneys received; and, thirdly, after his decease to pay and distribute the residue as directed. It will thus be seen that the intention of Fellows to vest the title in the trustee, and not make him a mere attorney under a revocable power of attorney, is too clear for dispute.

This intent should have effect, unless some statute or rule of law stands in the way. It is the injunction of the statute that "in the construction of every instrument creating or conveying, or authorizing the creating or conveying of any estate or interest in lands, it shall be the duty of courts of justice to carry into effect the intent of the parties, so far as such intent can be collected from the whole instrument, and is consistent with the rules of law." (1 R. S., 748.) This statute rule requires not only that the language of an instrument unquestionably valid shall be so construed as to give effect to the intent of the parties, but that the construction shall be such as to uphold the instrument rather than to nullify it. (*Post v. Hover*, 33 N. Y., 593.)

At common law this instrument would have been valid and effectual to pass the title to the real estate. (4 Kent's Com., 320; *Leggett v. Perkins*, 2 Coms., 297; *Wright v. Miller*, 8 N. Y., 9.) But the claim is that it is inoperative to pass the title under our statutes, because no express trust is created under section 55 of article 2, title 2, chapter 1, part 2 of the Revised Statutes, and because section 88 provides that where an express trust shall be created for any purpose not enumerated, no estate shall vest in the trustees; but the trust, if directing or authorizing the performance of any act which may lawfully be performed under a power, shall be valid as a power in trust. It is conceded by the counsel for the trustee

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that no estate vested unless a valid trust was created for some one or more of the purposes mentioned in section 55. He claims, however, that there was a valid trust under subdivision 3 of the section "to receive the rents and profits of lands and apply them to the use of any person during the life of such person or for any shorter term." Here were lands situated in eight different States. The trustee was directed to sell them at retail for the best price he could get. It would be impossible to sell them all at retail immediately, and the probabilities were that it would take years to do so. The grantor evidently supposed that they would not all be sold in his lifetime, as he made provision for distribution, after his death, to his heirs. Under such a power, while the trustee was bound to make the sale with reasonable dispatch, careful regard being had to the interests of the beneficiaries, he was not required to sell until he could find such purchasers as would purchase and pay for the property its fair value. The grantor, therefore, provided that until the lands should be sold, the trustee should rent them for the best price he could get, and that he should pay the avails, both the rents and proceeds of sales, as above specified.

I am of opinion that here was a trust to receive the rents and profits and apply them to the use of the grantor. It is no objection to the validity of the trust that the avails of the real estate were to be applied to the use of the grantor (*Van Epps v. Van Epps*, 9 Paige, 237; *Matter of Livingston*, 34 N. Y., 555; *Rome Ex. Bank v. Eames*, 1 Keyes, 588); or, that the avails of the real and personal estate were to be mingled together and applied. (*De Kay v. Irving*, 5 Denio, 646.) The direction to "pay over" is, substantially, a direction "to apply to the use." (*Leggett v. Perkins*, 2 N. Y., 297; *Leggett v. Hunter*, 19 id., 445, 454.) It is true that nothing is said in the instrument about receiving the rents, but that is necessarily implied. The authority to rent carries with it an authority to receive the rents. It is not necessary that the purpose of the trust should be declared in the words of the statute; it is sufficient that a purpose within the stat-

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ute is clearly embraced within the language used. (*Vernon v. Vernon*, 53 N. Y., 351, 359; *Tobias v. Ketchum*, 32 id., 319.)

It is claimed on behalf of defendants that the authority to rent is merely incidental to the absolute authority to sell, and that, therefore, there is no valid trust to receive rents and profits within the statute; and this view was sanctioned by the opinion of the learned judge who wrote the opinion of the General Term. Precisely what is meant by the word "incidental," in this connection, I do not understand. The authority to receive rents and profits was not conferred as incidental to the authority to sell, but was conferred in express language and by terms just as absolute as the power to sell. The authority to sell was, doubtless, the primary and most important authority, and when exercised would put an end to the authority to lease. But until the land should be sold, the power to lease was also important, and its exercise for the benefit of the beneficiaries under the instrument was just as essential, until the power to sell should be called into exercise, as the latter power. The leasing of the lands was one of the express purposes for which the conveyance was made, and hence it is in no sense merely incidental to any other purpose. In *Irving v. De Kay* (9 Paige, 521) the chancellor said: "If any of the purposes for which the trust was created are legal and valid, and would have authorized the creation of such an estate, the legal title vests in the trustees during the continuance of such valid objects of the trust."

It is further claimed by the learned counsel for defendants that a trust within the third subdivision of section 55 operates to suspend alienation, although the title be vested in the trustee, and that there can be no such trust where there is absolute and unqualified authority and discretion to sell, and it was mainly upon this ground that the case was decided against the plaintiff in the courts below. The claim, as I understand it, is, that where there is a trust, under section 55, to lease lands, the title must vest in the trustee for some term, and during such term must be inalienable under the

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statute; that such a trust cannot coexist with an absolute power of sale which may be executed at once, and that the trustee having absolute power to sell cannot vest himself with title in trust by voluntarily creating a term by his action or omission to sell.

There is no statute providing that a trust to receive the rents and profits and apply them until the land shall be sold, may not coexist with an absolute power of sale, and there is nothing in the nature of the trust and the power which forbids their coexistence.

There is no statute which provides, that, in order to vest title to land in a trustee upon such a trust, the power of alienation must for some term be legally suspended, and there is no reason for such a suspense of alienation. Alienation may be practicably and necessarily suspended and yet not theoretically, in law, suspended; and during such suspense the title may vest for the purpose of such a trust.

The trustee does not confer title to the real estate upon himself by omitting to exercise the power of sale. He takes the title upon the lawful trust at the same time that he takes the power, and while he can put an end to the trust by exercising the power, until he does exercise it the title and trust remain. Suppose the grantor had conferred the title with the trust upon one person and made some other person the donee of the power, could it be doubted that the trust estate would vest at once and remain in the grantee until the power was exercised? There would have been no legal suspense of alienation, and yet no practical or legal inconsistency between the trust estate and the power of sale. The statute requires no particular length of time for the trust to continue. It may be for life or for any shorter term. The duration of the term may not be fixed and certain, and a term, the length of which is defined in the instrument, cannot differ in substance from one which the language of the instrument when applied to the circumstances of the case makes necessary. A trust which must exist for one day is just as valid as one which must exist for life.

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Dissenting opinion, per EARL, J.

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This construction of the statute is in no way in contravention of its letter or spirit, and must certainly be found in its practical consequences most convenient and suitable. The position of this case would have been the same if the instrument had conferred a purely discretionary power instead of an absolute direction to sell. There would have been no legal suspense of the power of alienation in that case. It might be some years before the lands could all be sold, and unless in the mean time the trustee could lease and receive the rents and profits, the beneficial purposes of the grantor would be defeated; unless the trustee held the title and could thus control the possession, he could not execute the trust. A construction of the statute which leads to such consequences should not be tolerated unless some controlling authority requires it. To maintain his construction defendants' counsel calls our attention to 1 Revised Statutes (730, § 65), and to the following authorities: *Boynton v. Hoyt* (1 Denio, 57); *Hawley v. James* (16 Wend., 160); *Lang v. Ropke* (5 Sandf. Sup. R., 369). Section 65 provides that when the trust shall be expressed in the instrument creating the estate, every sale, conveyance or other act of the trustees in contravention of the trust shall be absolutely void. This section has reference to a sale not authorized by the instrument creating the trust. A sale thus authorized, which simply terminates the trust, cannot be said to be in contravention of it. In *Boynton v. Hoyt*, Judge BRONSON said a trust to receive the rents and profits and apply them under subdivision 3 of section 55, did suspend the power of alienation. That was said in a case where there was a term during which the rents and profits were to be received, and the question was whether the power of alienation was illegally suspended, and as the term was longer than authorized by statute, it was held to be illegal and void. In *Hawley v. James*, Judge BRONSON again used the same language in a case where he held the power of alienation was illegally suspended by a trust to continue longer than the statute allowed. In *Lang v. Ropke*, DUEB, J., said: "It may be admitted that the necessary effect of the trust



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Dissenting opinion, per EARL, J.

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which this will creates in relation to the rents and profits was to suspend, during its continuance, the absolute power of alienation, but as the trust was to last no longer than until the youngest child of the testator should attain the age of twenty-one years, the suspense which it involved was far within the limits which the statute allows." In those cases the question here involved was not under consideration. There the rents and profits were to be received for certain terms, and as there was no power to sell during the terms, there was a suspense of the power of alienation—in the two former cases for a period not authorized by law, and in the latter case for a period authorized. The question whether a power to sell could coexist with the trust was not involved in either case.

On the other hand, showing that this is a valid trust that can exist without a legal suspense of the power of alienation, and that it can coexist with an absolute power of sale, there are a number of authorities. In *McLean v. MacDonald* (2 Barb., 534), lands were devised to trustees upon trust, to receive the rents and profits thereof, and to sell the same and invest the proceeds on bond and mortgage, and to collect the income and profits and apply the same during two specified lives, to the use of certain persons named; and it was held that there was a valid trust, under section 55, and that the trustees were seized of such an estate in the lands as would entitle them to maintain ejectment. The case is imperfectly reported. But as I understand the facts, the trust and power of sale coexisted and there was no suspense of alienation, the trustees being empowered at any time to sell the real estate. The fact that they were to invest the proceeds and continue trustees of them as personal estate had nothing to do with the validity of the trust as to the real estate. That terminated when the sale was made. In *Belmont v. O'Brien* (12 N. Y., 394), lands were conveyed to trustees upon trust to receive the rents and profits, and they were empowered at any time to sell the lands and to invest the proceeds in other lands or personal securities. It was



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Dissenting opinion, per EARL, J.

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held that the trust to receive the rents and profits was a valid one; that the title vested in the trustees and that the power of sale could coexist with the trust, and that a sale of the lands was not in contravention of the trust within section 65 of the statute. There was no suspense of alienation. Judge HAND said: "The same person may hold the estate in trust for one purpose, and at the same time be a grantee of a power in trust to be executed or take effect at some future day for another. Here the owner in fee gave the power by the same instrument that conveyed the estate; and suppose it had been an absolute power to sell and terminate the present use and appoint the money, it could never have been the intention of the legislature, not only to frustrate the intention of the grantor, but to make an entirely different conveyance. \* \* \* Where a sale is directed in the instrument creating the trust, such sale is not "in contravention of the trust," nor is it repugnant to the grant or devise, for that provides the defeasance, new use, executory limitation, or whatever it may be." In *Fitzgerald v. Topping* (48 N. Y., 438) lands were conveyed to a trustee upon trust to receive the rents and profits, and to sell under the control and direction of the court. There was no suspense of the power of alienation, as the lands could at any time be sold with the consent of the court; and it was held that the title vested in the trustee, and that he could recover the lands in an action of ejectment. In *Vernon v. Vernon* (53 N. Y., 351) executors were empowered to receive rents of certain stores and pay them over to the testator's wife during her life, and they were also empowered to sell the stores at a minimum price. There was no legal suspense of alienation, and yet it was held that the trust was valid, and that the executors took the legal title. In *Marvin v. Smith* (56 Barb., 600), Smith being seized of certain lands, conveyed the same by deed to Bennett forever, in trust, to receive the rents and profits and appropriate the same for the sole use and benefit of Smith's wife, according to her directions, and after her death, in case the grantor should survive her, to convey the

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Dissenting opinion, per EARL, J.

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lands to her children ; but in case no children or descendants should survive her, that then the remainder of the estate granted should, after her death, be conveyed to the grantor, if living ; and, in further trust, that whenever the wife should desire a sale or mortgage of the premises, or any part thereof, the grantee should sell or mortgage such part or portion and pay over the proceeds to the wife, or reinvest the same according to her directions. There was no suspense of the power of alienation. The trustee could sell, with the consent of the wife, at any time, and yet it was held that the trust was valid, and that the title vested in the trustee. Judge TALCOTT speaking of *Belmont v. O'Brien* (*supra*) says : "Although the power in that case was to sell and reinvest upon the same trusts, and in this case, there is no specific direction to apply the proceeds of the sale or mortgage to the same trusts, yet the argument of the opinion in that case, I think, satisfactorily shows, if argument were needed, that a trust and a power to terminate it, contingent or otherwise, may exist together when they are not inconsistent." That case was affirmed in the Court of Appeals (46 N. Y., 571), and the opinion of Judge TALCOTT expressly indorsed. In *Gallie v. Eagle* (65 Barb., 583) there was a trust in land to receive the rents and profits and apply the same to the support of a minor until he should attain the age of twenty-one years ; and the trustee was authorized, in his discretion, to sell and grant the land and invest and hold the proceeds on the same trust. There was the same objection to this trust which has been made here, and it was held that it was valid, and that the trustee had the title and could maintain an action for the partition of the land. In *Fellows v. Heermans* (4 Lans., 230) an action by the grantor against the grantee, the plaintiff in this action, to set aside the instrument now under consideration, Judge HOGEBOOM, with whom Judge PARKER concurred, held that this was a valid trust under section 55. I therefore hold, both upon principle and authority, that there was a valid express trust created by this instrument to receive and apply the rents and profits of the lands to the

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Dissenting opinion, per EARL, J.

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use of the grantor during his life, and that the title vested in the grantee, the plaintiff.

It is claimed by the plaintiff that this trust survived the grantor, and that it must continue until the land shall all be sold under the power conferred upon the trustees. The trust is authorized "to receive the rents and profits of lands and apply them to the use of any person during the *life* of *such* person, or for a *stated* term," subject to the rules prescribed in the first article of the same title. The trust need not be for the benefit of one person only, but may be for the benefit of more than one, provided the conveyance creating the trust does not suspend the power of alienation of the land, or authorize a suspense of alienation for a period longer than that allowed by article 1, referred to. I am inclined to think that this trust cannot be upheld for a longer period than the life of the grantor, and that it, therefore, terminated at his death, and that the legal title to the land, subject to the execution of any valid power contained in the instrument, then vested in the heirs of the grantor, unless there is some other valid trust which continued the legal title in the trustees.

Section 55, subdivision 1, authorizes an express trust "to sell lands for the benefit of creditors," and a deed conveying lands upon such a trust vests the legal title in the trustee. (§ 60; *Duwall v. English Ev. L. Church of St. James*, 53 N. Y., 500.) This deed, after providing for the expenses of the trust and the payment of the avails of the property, during the life of the grantor, to him, provides as follows: "After my decease and after the payment of all my just and legal debts and the expenses of the trust aforesaid, the residue shall be distributed," etc. Here is a power to sell and pay the avails to the grantor during his life, and after his death, a power to sell, and *after* the payment of debts, to distribute the balance as directed. This is the same as if he had provided that the trustee should sell and use the proceeds first to pay his debts and then to distribute the balance to his appointees or heirs. If it had been in that form no one would dispute that, within the statute, it was a power to sell for the benefit of creditors.

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The language used has the same effect. The lands must be sold, and the debts, which at the creation of the trust amounted to nearly \$250,000, must be first paid. It is not necessary that a trust should be expressed in the language of the statute. It is one of the fixed rules of equitable construction that there is no magic in particular words, and any expression that shows unequivocally the intention of the parties to create a particular trust will have effect. Language will be liberally construed to give effect to the intention of the parties and to uphold the trust deed. (Hill on Trustees [2d Amer. ed.], 82, and cases cited.)

Here, then, the plaintiff held the legal title to the real estate upon a valid trust, during the life of the grantor. At his death the trust to sell, for the benefit of creditors, came into activity, and the plaintiff took the legal title for the purposes of that trust. Such legal title will continue in him until that trust is fully discharged. As debts remained unpaid at the time of the trial, and there was no proof that there was one dollar of personal property to pay them, he then had the legal title and was entitled to recover by virtue thereof.

In the examination of this case I have not deemed it important to consider the force and effect of the instrument executed October fifteenth. If valid that instrument, certainly, did not weaken plaintiff's title; if invalid, the original instrument was not affected by it.

But there was another defence relied upon at the trial which must be briefly considered. The defendants proved that on the 16th day of December, 1870, a contract was made between Joseph Fellows and defendant Robertson, for the sale of the land in question by Fellows to Robertson, for the sum of \$800, and that defendants went into possession under that contract. The terms of that contract are not set out in the case, and it does not appear that any portion of the \$800 was paid or tendered by the defendants to any one. The defendants did not claim, either in their answer or upon the trial, to have the contract specifically performed, and there was no proof showing that they were entitled to have it thus

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performed. I am unable to perceive how this contract and the circumstances connected with it furnish any defence to this action. Fellows had divested himself of the title to the land by the deed of trust, and thereafter had no right to interfere with the land. He could compel an execution of the trust by the trustee, and if he unreasonably delayed sales of the land could, undoubtedly, as one of the beneficiaries of the trust, hasten the sales. But he could not, himself, sell or contract to sell any of the lands. It matters not that he was to receive the entire avails of all sales made in his lifetime. The trustee was not absolutely required to sell all the lands in his lifetime; it may not have been practicable to do so. There were, therefore, other beneficiaries interested, and they were entitled to have the judgment of the trustee in making the sales. Fellows had no more right to sell the lands, or make contracts of sale, than any stranger.

I am, therefore, of opinion that upon the facts appearing upon the trial, the plaintiff was entitled to recover, and the judgment of the General Term should be reversed, and new trial granted, costs to abide event.

ANDREWS and MILLER, JJ., concur with ALLEN, J.; CHURCH, Ch. J., and FOLGER and RAPALLO, JJ., concur in result, on the ground that under the contract with Fellows, the defendant, not being in default, established an equitable defence to the action. EARL, J., dissenting.

Judgment affirmed.

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EBENEZER S. B. BRIGGS et al., Appellants, v. THOMAS M. PARTRIDGE et al., Respondents.

An executory contract under seal for the purchase of lands, executed by the vendee in his own name, cannot be enforced as the simple contract of another not mentioned in or a party to the instrument, on proof that the vendee named had oral authority from such other to enter into the contract, and acted as his agent in the transaction; at least in the absence

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| 151 | 262 |

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of proof of some act of ratification on the part of the undisclosed principal.

*It seems*, that in case of a simple contract the rule is otherwise and the principal is bound.

(Argued February 3, 1876; decided March 21, 1876.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York affirming a judgment in favor of defendants, entered upon an order dismissing plaintiffs' complaint on trial. (Reported below, 7 J. & S., 339.)

This action was brought to recover the purchase-money unpaid under a contract for the purchase and sale of lands.

The complaint alleged that the plaintiffs entered into an agreement in writing with one L. P. Hurlburd, who was acting for and under the authority of the defendants, "whereby these plaintiffs sold and the defendants through said Hurlburd bought" a certain described piece of land, "for the sum of \$7,200, which said sum the defendants, through their agent, the said Hurlburd, agreed to pay," as specified. That it was further agreed that the plaintiffs should deliver the deed, and that the defendants should accept the same and pay the balance of the purchase-money unpaid on the 1st day of February, 1874; that the defendants, through said Hurlburd, paid on the delivery of the agreement \$100; that on the said first day of February, 1874, the plaintiffs were "ready to carry out on their part the agreement aforesaid by executing and delivering to said Hurlburd, for and on account of said defendants, a good and sufficient deed of the premises hereinbefore described." Whereas the defendants wholly failed on their part to fulfill said agreement or to take title to said property, but on the contrary refused, and they have ever since refused so to do, and the plaintiffs demanded judgment that the defendants perform said agreement and pay to plaintiffs the sum agreed. The answer was a general denial.

Plaintiffs' counsel, in opening the case on the trial, said that the agreement on which the plaintiffs relied was in writing; that it was made by the plaintiffs as vendors, and

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Llewellyn P. Hurlburt as vendee; that the written instrument did not show but that Hurlburt was a principal party; that it was signed and sealed by Hurlburt individually; that the name of defendant Partridge did not appear in the instrument, but that plaintiffs would prove that the said Hurlburt was acting solely for and under the direction of Thomas M. Partridge, who paid or caused to be paid the first payment under the contract; that said Hurlburt was the agent and trustee of said Partridge in the transaction, and the authority given by Partridge to Hurlburt was oral.

On this opening and on the complaint the defendants' counsel moved to dismiss the complaint on the grounds: First. That the facts stated in the opening and by the complaint did not constitute a cause of action. Second. That it was not competent to vary the terms of the written contract by parol proof that the party who executed the same as principal was not a principal, but an agent.

The plaintiffs' counsel further offered to prove that Hurlburt was constituted by parol agent to enter into and execute the contract in behalf of the defendant Partridge; that at the time the contract was made the plaintiffs did not know that Partridge was the real principal; that the plaintiffs tendered a deed to Hurlburt, and did not at that time know that Partridge was the real principal.

The motion was thereupon granted, and plaintiffs' counsel duly excepted.

*Edward D. McCarthy* for the appellants. It was proper to prove that the contract was signed by the agent of an undisclosed principal, in whose behalf the contract was made. (*Higgins v. Senior*, 8 M. & W., 834; *Wilson v. Hart*, 7 Taunt., 295; *Truman v. Loder*, 11 Ad. & El., 594; *Hubbert v. Borden*, 6 Whart., 91; *Ruiz v. Norton*, 4 Cal., 358; *Huntington v. Knox*, 7 Cush., 371; *Mech. Bk. v. Bk. of Col.*, 5 Wheat., 326; *East. R. R. Co. v. Benedict*, 5 Gray, 566; *Potter v. Yale College*, 8 Conn., 60; *Dykers v. Townsend*, 24 N. Y., 61; *Coleman v. Loder*, 53 id., 393; *Ford v. Wil-*

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*liams*, 21 How. [U. S.], 289; *Stackpole v. Arnold*, 11 Mass., 27; *William v. Christie*, 4 Duer, 29; *Fenly v. Stewart*, 5 Sandf., 101; 2 Gray, 393; 8 Pick., 56; 9 Al., 421.)

*Wm. F. Shepard* for the respondents. It was not competent to vary the written contract by parol proof that the party who executed it in his name as principal was in fact agent. (*Pumpelly v. Phelps*, 40 N. Y., 59; *De Witt v. Walton*, 9 id., 571; *Orchard v. Biningger*, 51 id., 652; *Foster v. Fuller*, 6 Mass., 58; *Buffum v. Chadwick*, 8 id., 103; *Stackpole v. Arnold*, 11 id., 27; *Pentz v. Stanton*, 10 Wend., 271; *Barker v. Mer. Ins. Co.*, 3 id., 94; *Spencer v. Field*, 10 id., 87; *Taft v. Brewster*, 9 J. R., 334; *Stone v. Wood*, 7 Cow., 453; *Rowland v. Phelan*, 1 Bosw., 43; *Moss v. Livingston*, 4 Comst., 208; *Haight v. Sahler*, 30 Barb., 218; *Esp. Church v. Varian*, 28 id., 644; *Fenly v. Stewart*, 5 Sandf., 101; *Mason v. Breslin*, 2 Swe., 386, 394; *Aub. City Bk. v. Leonard*, 40 Barb., 119, 136; *Babbett v. Young*, 51 id., 466; *Lincoln v. Crandell*, 21 Wend., 101; *Galusha v. Hitchcock*, 29 Barb., 193; *Williams v. Christie*, 4 Duer, 29, 36; *Squier v. Norris*, 1 Lans., 282, 284.) The contract being under seal, could not be changed by oral testimony into a simple contract for the purpose of enforcing it against one not a nominal party to it. (*Townsend v. Hubbard*, 4 Hill, 351; 2 R. S., 135, §§ 8, 9.)

ANDREWS, J. The defendant was not a party to the agreement for the sale and purchase of the land. He did not sign it himself, nor did it purport to have been executed for him by Hurlburd. His name does not appear in it, and there is nothing upon the face of the agreement to indicate that he was in any way connected with or interested in the purchase. The covenants in the agreement are solely between the plaintiff and Hurlburd. The former covenants to sell and convey the land to Hurlburd, and Hurlburd covenants to purchase and to pay the purchase-money as stipulated. The defendant took no part in the negotiation of the agreement,



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and the plaintiff, when he made and executed it, had no knowledge that Hurlburd was acting as the agent of the defendant. The agreement was under seal, each party affixing his own seal to the instrument. Hurlburd, the apparent purchaser, was in fact acting in the transaction as the agent of the defendant, his undisclosed principal, under an oral authority to enter into the contract in his behalf, and the defendant furnished the money to make the down payment to the broker who negotiated the sale. This action is brought by plaintiff upon the agreement to recover the unpaid purchase-money, and it is sought to enforce it against the defendant as the real purchaser and party, upon the ground that Hurlburd, the nominal purchaser was acting for him and by his authority in the transaction. The real question is, can the vendor, in a sealed executory agreement, *inter partes*, for the sale of land, enforce it as the simple contract of a person not mentioned in or a party to the instrument, on proof that the vendee named therein, and who signed and sealed it as his contract, had oral authority from such third person to enter into the contract of purchase, and acted as his agent in the transaction, and can the vendor on this proof, there having been no default on his part, and he being ready and willing to convey, recover of such third person the unpaid purchase-money? This question here arises in a case where the vendor, so far as it appears, has remained in possession of the land, and where no act of ratification of the contract by the undisclosed principal has been shown. It is not disputed, and indeed it cannot be, that Hurlburd is bound to the plaintiff as covenantor, upon the covenants in the agreement. He covenants for himself and not for another, to pay the purchase-money, and by his own seal fixes the character of the obligation as a specialty. He is liable to perform the contract irrespective of the fact whether it can be enforced against his nominal principal. On the other hand it is equally clear that Hurlburd's covenant cannot be treated as, or made the covenant of the defendant. Those persons only can be sued on an indenture who are named as parties to it, and an action will not lie against one person on

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a covenant which purports to have been made by another. (*Beckham v. Drake*, 9 M. & W., 79; *Spencer v. Field*, 10 Wend., 88; *Townsend v. Hubbard*, 4 Hill, 351.)

In the case last cited, it was held that where an agent duly authorized to enter into a sealed contract for the sale of the land of his principals, had entered into a contract under his own name and seal, intending to execute the authority conferred upon him, the principals could not treat the covenants made by the agent as theirs, although it clearly appeared in the body of the contract that the stipulations were intended to be between the principals and purchasers, and not between the vendees and the agent. The plaintiffs in that case were the owners of the land embraced in the contract, and brought their action in covenant to enforce the covenant of the vendees to pay the purchase-money, and the court decided that there was no reciprocal covenant on the part of the vendors to sell, and that for want of mutuality in the agreement the action could not be maintained. It is clear, that unless the plaintiff can pass by the persons with whom he contracted, and treat the contract as the simple contract of the defendant, for whom it now appears that Hurlburd was acting, this action must fail. The plaintiff invokes in his behalf the doctrine that must now be deemed to be the settled law of this court, and which is supported by high authority elsewhere, that a principal may be charged upon a written parol executory contract entered into by an agent in his own name, within his authority, although the name of the principal does not appear in the instrument, and was not disclosed, and the party dealing with the agent supposed that he was acting for himself, and this doctrine obtains as well in respect to contracts which are required to be in writing, as to those where a writing is not essential to their validity. (*Higgins v. Senior*, 8 M. & W., 834; *Trueman v. Loder*, 11 Ad. & Ellis, 594; *Dykers v. Townsend*, 24 N. Y., 61; *Coleman v. First Nat. Bk. of Elmira*, 53 N. Y., 393; *Ford v. Williams*, 21 How., 289; *Huntington v. Knox*, 7 Cush., 371; *The Eastern*

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Contracts.

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*R. R. Co. v. Benedict*, 5 Gray, 566; *Hubbert v. Borden*, 6 Wharton, 91; *Browning v. Provincial Ins. Co.*, 5 L. R. [P. C.], 263; *Calder v. Dobell*, 6 L. R. [C. P.], 486; Story on Agency, §§ 148, 160.

It is, doubtless, somewhat difficult to reconcile the doctrine here stated with the rule that parol evidence is inadmissible to change, enlarge or vary a written contract, and the argument upon which it is supported savors of subtlety and refinement. In some of the earlier cases the doctrine that a written contract of the agent could be enforced against the principal, was stated with the qualification, that it applied when it could be collected from the whole instrument, that the intention was to bind the principal. But it will appear from an examination of the cases cited, that this qualification is no longer regarded as an essential part of the doctrine. Whatever ground there may have been originally to question the legal soundness of the doctrine referred to, it is now too firmly established to be overthrown, and I am of opinion, that the practical effect of the rule as now declared is to promote justice and fair dealing. There is a well-recognized exception to the rule in the case of notes and bills of exchange, resting upon the law merchant. Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them; and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent. (*Barker v. Mechanics' Ins. Co.*, 3 Wend., 94; *Pentz v. Stanton*, 10 id., 271; *De Witt v. Walton*, 9 N. Y., 571; *Stackpole v. Arnold*, 11 Mass., 27; *Eastern R. R. Co. v. Benedict*, 5 Gray, 566; *Beckham v. Drake*, 9 M. & W., 79.) That Hulburd had oral authority from the defendant to enter into a contract for the purchase of the land, and that he was acting for the defendant in making it is admitted; and if the contract had been a simple contract and not a specialty the defendant would, I think, have been bound by it within the authorities cited. No question would arise under the statute of frauds, for the statute prescribing what shall be necessary

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to make a valid contract for the sale of lands requires only that the contract, or some note or memorandum thereof expressing the consideration, should be in writing and subscribed by the party by whom the sale is to be made, or his agent lawfully authorized. (2 R. S., 135, §§ 8, 9.) In this case the contract was signed by the vendors; and even if it had been executed on their part by an agent pursuant to an oral authority, it would have been a valid execution within the statute. (*Lawrence v. Taylor*, 5 Hill, 113; *Worrall v. Munn*, 1 Seld., 229.) But the vendee's contract need not be in writing. (*McCrea v. Purmort*, 16 Wend., 469.)

We return, then, to the question originally stated. Can a contract under seal, made by an agent in his own name for the purchase of land, be enforced as the simple contract of the real principal when he shall be discovered? No authority for this broad proposition has been cited. There are cases which hold that when a sealed contract has been executed in such form, that it is, in law, the contract of the agent and not of the principal, but the principal's interest in the contract appears upon its face and he has received the benefit of performance by the other party and has ratified and confirmed it by acts *in pais*, and the contract is one which would have been valid without a seal, the principal may be made liable in assumpsit upon the promise contained in the instrument, which may be resorted to to ascertain the terms of the agreement. (*Randall v. Van Vechten*, 19 J. R., 60; *Du Bois v. The Del. and Hud. Canal Co.*, 4 Wend., 285; *Lawrence v. Taylor*, 5 Hill, 107; see, also, *Evans v. Wells*, 22 Wend., 324; *Worrall v. Munn*, *supra*; Story on Agency, § 277; 1 Am. Lead. Cas., 735, note.)

The plaintiff's agreement in this case was with Hulburd and not with the defendant. The plaintiff has recourse against Hulburd on his covenant, which was the only remedy which he contemplated when the agreement was made. No ratification of the contract by the defendant is shown. To change it from a specialty to a simple contract,

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in order to charge the defendant, is to make a different contract from the one the parties intended. A seal has lost most of its former significance, but the distinction between specialties and simple contracts is not obliterated. A seal is still evidence, though not conclusive, of a consideration. The rule of limitation in respect to the two classes of obligations is not the same. We find no authority for the proposition that a contract under seal may be turned into the simple contract of a person not in any way appearing on its face to be a party to or interested in it, on proof *de hors* the instrument, that the nominal party was acting as the agent of another, and especially in the absence of any proof that the alleged principal has received any benefit from it, or has in any way ratified it, and we do not feel at liberty to extend the doctrine applied to simple contracts executed by an agent for an unnamed principal so as to embrace this case. The general rule is declared by SHAW, Ch. J., in *Huntington v. Knox* (7 Cush., 374): "Where a contract is made by deed, under seal on technical grounds, no one but a party to the deed is liable to be sued upon it, and therefore if made by an attorney or agent it must be made in the name of the principal in order that he may be a party, because otherwise he is not bound by it."

The judgment of the General Term should be affirmed.

All concur.

Judgment affirmed.

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JEDEDIAH H. LATHROP et al., Respondents, v. MOSES B. BRAMHALL et al., Appellants.

In an action tried by a referee where evidence is received competent as against one or more of several defendants, it is not error for the referee to refuse to decide, either at the time the evidence is received or at the close of the case, as to which of the defendants the evidence is competent. (CHURCH, Ch. J., ALLEN and FOLGER, JJ., dissenting.)

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Statement of case.

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A refusal of a referee to pass upon an objection to evidence at the time it is offered and the receipt thereof, with a reservation of the question as to its admissibility until the close of the case, is improper, but is not necessarily fatal to the judgment. (CHURCH, Ch. J., ALLEN and FOLGER, JJ., dissenting.)

Such a reservation is to be considered upon appeal the same as if the objection had been overruled and an exception taken, and if the evidence were proper or could not have affected the rights of the objecting party injuriously, the reservation is not ground for reversal. (CHURCH, Ch. J., ALLEN and FOLGER, JJ., dissenting.)

A memorandum relating to the terms of a parol contract, made at the time by one of the parties negotiating the contract, and read over to the others, although not itself a valid contract, is competent as evidence to corroborate the oral evidence as to the terms of the contract; the memorandum does not make the oral evidence incompetent.

(Argued January 3, 1876; decided March 21, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department affirming a judgment in favor of the plaintiffs, entered upon the report of a referee.

This action was brought to recover a balance alleged to be due of the price agreed to be paid upon the transfer from plaintiffs to defendants of the capital stock of a corporation. The question was as to whether the sale was made to the defendants jointly or to the defendant Bramhall, the other defendants, composing the firm of Clews, Livermore & Co., claiming to have acted simply as agents for Bramhall.

Upon the trial evidence was offered on the part of plaintiffs of declarations of defendants, Bramhall and Clews. This was objected to as incompetent as against the other defendants. The referee reserved the question.

Other evidence offered by plaintiffs was objected to, and the question as to its admissibility reserved. Among other things, after proof of the terms of the contract of purchase, a memorandum was offered in evidence, which the evidence tended to show was made by the defendant Bramhall at the time of the contract and read over to the others present, which embodied some of the general features and terms of the purchase. This was objected to as not competent against the other defendants aside from Bramhall, as not competent

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Opinion of the Court, per MILLER, J.

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against Livermore, Clews & Co., except Mr. Clews, and also because it was proved that the contract was outside of the memorandum. The first question was reserved. The last objection was overruled, and defendants excepted. A motion was made to strike out the oral evidence as to the contract. This was denied, and defendants excepted. The referee, before the opening of defendant's case, decided some of the reserved questions, overruling the objections. As to the evidence objected to as incompetent as against some of the defendants, he declined to decide which of the defendants were affected thereby, but reserved the question until the decision. To this defendants' counsel duly excepted. Further facts appear in the opinion.

*Waldo Hutchins* for the appellants. The referee erred in refusing to pass upon the objection raised by defendants' counsel at the time it was raised. (*Peck v. Yorks*, 47 Barb., 131; *Johnson v. McIntosh*, 31 id., 267; *Sharpe v. Freeman*, 45 N. Y., 802; *McKnight v. Dunlap*, 5 id., 537, 545; *Brooks v. Christopher*, 5 Duer, 216; *Clussman v. Merkel*, 3 Bosw., 402; *Goddard v. Perkins*, 9 Gray, 411; *Waggoner v. Finch*, 1 N. Y. S. C., 145.) The referee erred in admitting in evidence the memorandum offered by plaintiffs. (*Newkirk v. N. Y., etc., Co.*, 38 N. Y., 158.)

*Chas. F. Southmayd* for the respondents. The referee did not err in reserving his decision as to the effect of certain evidence until a subsequent stage of the trial. (*Raymond v. Howland*, 17 Wend., 389.) A mere technical error in ruling by the referee, by which the party appealing has not been really prejudiced, is no ground for a reversal or new trial. (*Fabbri v. Mer. Ins. Co.*, 64 Barb., 85; *People v. Gonzalez*, 35 N. Y., 49; *Wattson v. Campbell*, 38 id., 53; *Wheeler v. Ruckman*, 51 id., 391; *Sutherland v. Rose*, 47 Barb., 144.)

MILLER, J. Upon the trial of this action the defendants' counsel objected to the admission of certain evidence offered

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Opinion of the Court, per MILLER, J.

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by the plaintiffs, and the decision of the referee was reserved in several instances until the close of the plaintiffs' evidence, when the referee proceeded to dispose of the objections to the admission of testimony, the rulings on which had been reserved. He refused to decide as to the persons affected by some portions of the evidence, holding that these questions could only be determined when the whole evidence was in, and, to the extent named, overruled the objections made by the defendants' counsel, who insisted that they were entitled to an absolute ruling upon the several questions, which the referee refused to give, and excepted to his several decisions thus made. Upon one of the rulings of the referee reversing his decision, defendants' counsel excepted to the reservation. In the subsequent stages of the case the referee made similar rulings, declining to decide against which defendant the evidence was allowed; and, at the close of the entire testimony, he declined to decide any of the questions thus reserved, stating that this would be determined on the decision of the case.

Without enumerating the various rulings of the referee upon the questions stated, it is sufficient to say that he, among other decisions, refused to rule whether a memorandum received in evidence, the admission of which will be hereafter particularly considered, should be regarded as evidence against the defendant Bramhall alone, or against all or any of the other defendants. He made the same reservation until the close of the testimony upon the question raised whether the acts or declarations of Clews were binding on the defendants other than the firm of which he was a member, also in respect to whether the letters written by Clews, and introduced upon the trial, were evidence.

The evidence which was thus admitted conditionally, and in regard to which the referee reserved his decision, affected the most important issues in the case, and the principal question involved, which was the liability of all of the defendants for the indebtedness, to recover which the action was brought. If the evidence tended to show the liability of any one of



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Opinion of the Court, per MILLER, J.

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the parties, it would be to that extent entirely competent. Whether it affected more than a single one, or all of them, could not well be determined at the time when the testimony was introduced, and might depend upon evidence which was subsequently given which tended to establish the liability of the defendants. It cannot always be decided at the moment when such testimony is offered as to what effect it may have, and when this cannot be done, there is no objection to a reservation of the decision for the time being. Some discretion must be allowed to the judge or referee in regard to questions of this kind. Where the trial is before a jury in open court, there would be an eminent propriety in a decision by the judge as to the applicability of such evidence before the case is finally submitted to their consideration; and then he should determine as to its effect in respect to any particular party, and give proper instructions in regard to it upon being requested to do so. (See *Raymond v. Howland*, 17 Wend., 389.) Under such circumstances, it is not apparent how the rights of the parties could be seriously affected by the reservation of the judge's decision. Upon a trial before a referee, there appears to be far less urgent necessity for the decision of questions of this character, even at the close of the case. As he takes the place of the jury, he is to balance the testimony and decide where the weight lies; and in so doing, must determine to what extent the evidence thus objected to bears upon the different parties. He can make a proper discrimination as to how far it affects one or more of the parties in most cases; and if this can be done, no injury can result from such a course of procedure. It is not apparent in the case before us how the defendants' interest could have been affected injuriously by the action of the referee, or their rights in any way impaired; and unless such was the case, no rule of law has been violated, and there is no legal error which will justify a reversal of the judgment.

An important distinction exists between the reservation of the question as to the effect of evidence and a reservation as

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to its admissibility, and the question arises and is directly presented by one or more of the decisions of the referee, whether the party who raises an objection to evidence offered by his adversary has a right to have such objection passed upon absolutely at the time when it is presented, and whether the refusal to do so is erroneous. We have been referred to a number of decisions, mostly in the Supreme Court, which are supposed to uphold the doctrine contended for. Although the marginal notes of these cases, and the dicta of some of the judges appear to sanction such a rule, a critical examination will show that it has not been decided in any of them that a judgment must necessarily be reversed when the referee receives evidence reserving his decision. (*Clussman v. Merkel*, 3 Bosw., 402; *Brooks v. Christopher*, 5 Duer, 216; *Peck v. Yorks*, 47 Barb., 131; *Waggoner v. Finch*, 1 N. Y. S. C. [T. & C.], 145; *McKnight v. Dunlop*, 5 N. Y., 537, 545.)

The precise question was not presented in any of the cases cited, and without discussing them more fully, it is sufficient to say that they are not in point. A contrary doctrine was held in *Kerslake v. Schoonmaker* (3 N. Y. [T. & C.], 524; 8 Hun, 436), where most of these cases are considered. As was held in the case last cited, if the decision of the referee might prove injurious, it would be liable to exception. There are cases where it is easy to see that the admission of evidence in this form might embarrass the defence in determining to what extent testimony should be introduced in answer to that which has been admitted under such a restriction. And where the case shows in any way that such a ruling would be prejudicial to the rights of the party objecting, it would be a subject of exception which would lead to a reversal of the judgment. It is quite as objectionable for a referee to make a mistake in his ruling, generally, as to make a decision reserving the question as to the admissibility of evidence which may in any way prejudice the party. As was well said in *Sharpe v. Freeman* (45 N. Y., 804), by Judge FOLGER: "It (the practice referred to) is then not to be commended, however, for it does not conduce to a clear and accurate trial of the action, nor to

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Opinion of the Court, per MILLER, J.

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the explicit presentation of the questions for review." When rulings of this kind are made, they must be considered upon review, the same as if an objection had been made and overruled and an exception taken to the decision of the referee. It is not apparent that any of the decisions which were reserved by the referee could have affected the rights of the defendant injuriously so as to render them liable to objection, and they therefore do not present any legal ground for a reversal of the judgment.

But a single objection is urged to the testimony which was received unqualifiedly, and that relates to the memorandum which was offered and received as evidence. It was objected to not only upon the ground that it was not evidence against any of the parties but Bramhall, or against any member of the firm of Livermore, Clews & Co., except Mr. Clews, but for the reason that it was proved that the contract was outside of the memorandum. The referee reserved his decision as to the first and second grounds, and overruled the objection as to the third ground. In a subsequent stage of the case a motion was made to strike it out on grounds which were stated and overruled. The remarks already made as to the right of the referee to reserve his decision under the circumstances are a sufficient answer to the first two objections made to its introduction. The other objections now urged will be further considered. The memorandum related to the terms of the purchase of the Frostburgh Coal Company. It stated the amount of capital stock, the number of shares and the price, and that cash was to be paid upon delivery. It also stated that Messrs. Lathrop and Graham were to have a certain number of shares which were named at cost, as well as certain other matters which it is not material to recite. This paper alone of itself was of but little, if any, importance, as there was no particular contradiction as to the terms of the purchase, without oral evidence to establish that the purchase was a joint one, and made for the benefit of all the defendants. The evidence in regard to it tended to show that at the time of the alleged meeting of the parties when the sale was made, Bramhall,

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Opinion of the Court, per MILLER, J.

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one of the defendants, made this written memorandum, which was found among his papers, and read it over to those who were present, inquiring whether it was correct or whether the parties who were present should take the stock which was then sold. It was not offered to refresh the memory of the witness, and was not admissible in that point of view, and the rule applicable to such a case cannot be invoked, nor was it competent alone as the contract of the parties, but it was evidence which corroborated and confirmed the oral proof as it coincided with it as to the terms of the contract. The two together showed what the contract was, and there can be no valid objection where an oral contract is made to prove that its principal terms were written down and a memorandum made of them and read at the time. The one is not a substitute to the other, and both are properly admissible without violating any rule of law. It is not a case where a valid contract is made in writing which entirely supersedes the oral contract, but one where an oral contract is entered into and a memorandum made at the time as to its general features and characteristics. Regarding it in this light there would be no reason for striking out the oral testimony as was asked upon the trial in reference to the same matter.

An objection is made that the memorandum was not properly identified. There was evidence to show that it was in Bramhall's handwriting, and that it was the memorandum made at the meeting, and if there was any defect in this respect the testimony of Bramhall, as to its identity, was of such a character as to render it a fair question for the referee to determine whether it was sufficiently identified. It cannot be claimed that there was such an entire absence of evidence in regard to it as would authorize its rejection for the reason stated, and as there was at least some evidence, it was for the referee to decide as to the weight to be given to the testimony which related to its identity.

It is not the province of this court to consider the weight of the evidence upon the question of the joint liability of

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Dissenting opinion, per ALLEN, J.

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the defendants. That duty belonged to and has been discharged by another tribunal.

As no legal error was committed upon the trial, the judgment must be affirmed, with costs.

ALLEN, J. (dissenting). The question presented by the exception to the refusal of the referee to pass definitely upon the questions of evidence as they arose and were made in the progress of the trial, is the more important by reason of the vicious practice which, although of recent origin, has had a rapid growth in the practice of referees in the trial of causes before them. The practice of reserving questions as to the admissibility of evidence and its competency when reasonably made in the course of the trial, is not to be commended even when assented to by counsel. It seriously interferes with the proper and orderly conduct of the trial and tends to embarrass the parties whenever a review of the trial becomes necessary. The comments of Judge FOLGER upon the practice, in *Sharpe v. Freeman* (45 N. Y., 802), are just and should be heeded as well by counsel as by referees and trial courts.

The Code provides that the trial by referees shall be conducted in the same manner as a trial by the court. (Code § 272.) No change is made by the Code in any of its provisions in respect to the conduct of trials, the introduction of evidence, the time and manner of objecting to its admission, the action and decision of the court or referee thereon, or the mode and manner of reviewing decisions made in the course of the trial. The common-law practice still prevails, and exceptions must be taken to decisions of questions arising in the progress of the trial at the time they are made, and if not then taken are waived.

In the final report of the referee he states the facts found from all the evidence, and the conclusions of law based thereon, and to such conclusions exceptions may be taken within ten days after notice of the judgment; but there is no place in the report for ruling upon questions of evidence or other interlocutory questions that may have arisen upon the trial,

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Dissenting opinion, per ALLEN, J.

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and no time given for exceptions to ruling upon questions of that character. (Code, §§ 268, 272.)

The right to object to evidence as it is offered is a legal right of which the party cannot be deprived, and the right to object and to be heard upon the objection, necessarily implies a like right to a decision by a court or referee, and the refusal to entertain an objection or to pass upon it when made is a denial of a legal right to which an exception lies. Wherever any matter is capable of being brought upon the record, and the court refuses to allow it to be so brought, this is the subject of a bill of exceptions. (Per Lord REDESDALE, *Lessee of Lawlor v. Murray*, 1 Sch. & Lef., 75.) When necessary, the judge or referee must pass on all preliminary questions of fact on which the admissibility of evidence depends, and he must do so whenever occasion requires in the progress of a trial. (*Doe v. Webster*, 12 A. & E., 442; 1 Arch. Prac., 359, 366.)

The judge or referee has, within proper limits, a discretion as to the order of proof, and may permit facts to be proved provisionally, subject to the condition that other facts shall be subsequently proved which are essential to the competency of the evidence admitted. But when all the facts, upon which the party relies for the admissibility of the evidence, have been put before the court by him and he has rested his case, the adverse party is then entitled to a definite determination as to the competency of the evidence objected to. It is then no longer a question as to the order of proof, nor is it within the discretion of the court to postpone the decision.

It appears by the record before us that the parties acquiesced by mutual consent in the reservation of several questions, made upon objections to the admissibility of evidence as against some of the defendants, which was conceded to be competent as against others until the close of the evidence on the part of the plaintiffs. The defendants objecting, then demanded, as they had a right to do, that the referee should pass upon the competency of the evidence as against them, respectively. The question was not as to the effect of the evidence, if admitted, but whether the defendants taking the

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Dissenting opinion, per ALLEN, J.

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objections had been so far connected with the transaction and the other parties who were actors in it as to make the evidence competent against them for any purpose. The question of admissibility was one of law; its effect was a question of fact. It was their right to know before entering upon their defence what evidence they had to meet, and they were necessarily embarrassed in their defence by the refusal of the referee to pass upon the questions made. A decision adverse to the plaintiffs would not have prevented a renewed offer of evidence upon other facts appearing; and had the evidence been either rejected or admitted, the defendants might have shaped their defence entirely differently from what they were compelled to do, proceeding in ignorance of the fact whether the evidence was in or out of the case as against them. If it be contended that the evidence objected to was competent as against all the defendants, the sting is not taken out of the exception to the refusal by the referee to decide the question.

The defendant had a right to the ruling of the referee upon the question, and an exception to the refusal so to rule should not be confounded with an exception to a refusal to sustain the objections to the evidence. The latter exception would have brought up the question as to the competency of the evidence. The exception actually made does not involve that question. A party has a legal right to a decision upon the admissibility of evidence, whether the same is competent or otherwise, and a refusal of that right is a legal error. A court sitting in review cannot say that a party is not prejudiced by such a refusal. The orderly administration of justice and the preservation of the rights of suitors require that referees as well as courts should be held to a strict observance of those substantial forms and modes of procedure, which are the result of experience and are firmly established. It is neither safe nor consistent with a proper administration of the laws to permit referees or trial courts to exercise their discretion as to whether they will or will not pass upon questions made in proper time and in proper form, or to permit

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Dissenting opinion, per ALLEN, J.

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each referee to be a law unto himself and leave it to the appellate tribunals to sustain or reverse judgments, as they may think justice has or has not been done in each case. The law vests no such discretion in courts or referees.

If a referee may exercise this power, and act upon his discretion, he may change the burden of proof, and, in fact, deprive the party of his exceptions and the benefits of established rules of evidence; but that it is error for a referee, under such circumstances, to refuse to decide questions of evidence as they are made is plainly intimated in *McKnight v. Dunlop* (1 Seld., 537), and the doctrine is affirmed in *Peck v. Yorks* (47 Barb., 131); *Brooks v. Christopher* (5 Duer, 216), and *Clusman v. Merkel* (3 Bos., 402). See, also, *Goddard v. Perkins* (9 Gray, 411), in which SHAW, Ch. J., says: "The parties are entitled to the judge's opinion, to his best judgment, on every question of law arising in the course of the trial." In *Bartlett v. Smith* (11 M. & W., 483), where the admissibility of a bill of exchange, purporting to be a foreign bill, and stamped accordingly, was objected to on the ground that it was, in fact, an inland bill drawn in London, and evidence was offered to prove that fact, it was held that the evidence ought to have been received in that stage of the cause, and the admissibility of the instrument passed upon by the judge, and that the evidence ought not to have been received afterwards as a part of the defendant's case; verdict having passed for the plaintiff, was set aside for this error of the judge.

The Code provides for the reservation of a certain class of questions upon the merits for further consideration by the judge, but questions of evidence are not among those that may be so reserved.

The judgment appealed from should be reversed, and a new trial granted.

For affirmance: FOLGER, ANDREWS, MILLER and EARL, JJ.;  
for reversal: CHURCH, Ch. J., ALLEN and RAPALLO, JJ

Judgment affirmed.



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Statement of case.

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HENRY FAUCETT, Respondent, v. FREDERICK S. NICHOLS,  
Appellant.

Under the provisions of the innkeepers' act of 1866 (chapter 658, Laws of 1866), exempting an innkeeper from liability for the loss by fire of property of a guest in a barn or outbuilding, where it shall appear that the loss was the work of an incendiary, and occurred without negligence on his part, the burden is upon the innkeeper to show that the fire was an incendiary one, and to show absence of negligence on his part.

In an action to recover for such a loss, evidence was given tending to show that the fire was the work of an incendiary, who gained access to the hay loft, where the fire was set, through a window opening into an alley. The window was left open and lumber was piled against the barn so that a person could easily climb upon it and enter the window. The court submitted to the jury the question whether leaving the window open was negligence, charging that if so, and it contributed to occasion an incendiary firing, defendant was liable. *Held*, no error; that the facts proved, although not strong, were some evidence of negligence sufficient to authorize the submission of the question to the jury; and that the negligent omission by an innkeeper to take reasonable and prudent precaution to guard against an incendiary fire was such negligence as would deprive him of the benefit of the act.

Negligence, which precedes and facilitates the commission of the crime, is as much within the statute as the negligent omission to protect and remove the property after discovery of the fire.

The question as to whether the fire was of incendiary origin was contested. Defendant offered to show that on the night of the fire an attempt was made to fire another building, a short distance from the barn of defendant, by the use of similar means to those which defendant's evidence tended to show were used in firing said barn. This evidence was objected to, and objection sustained. *Held*, error; that the evidence was competent as bearing upon the question of the origin of the fire.

*Faucett v. Nichols* (2 Hun, 521; 4 T. & C., 597) reversed, but not on point decided below.

(Argued February 11, 1876; decided March 21, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 2 Hun, 521; 4 T. & C., 597.)

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Statement of case.

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This action was brought against defendant, an innkeeper, to recover for the loss of plaintiff's horses, carriage, harness, etc., which were burned up in defendant's barn, plaintiff being at the time his guest. The defence attempted to be established was that the fire was the work of an incendiary, and that it occurred without defendant's negligence.

Defendant's evidence tended to show that the fire was of incendiary origin; that it was set in the hay loft, and that kerosene was poured on the barn floor, which caused the fire to spread rapidly. Plaintiff gave evidence tending to show that the fire might have been occasioned by the negligence of defendant's hostler in smoking in the barn. It appeared that the barn doors were fastened, but that a window or opening into the loft over a lane in the rear of the barn was left open, and that a pile of boards was piled up against the barn, so that a person could easily climb up thereon and gain an access to the hay loft. Defendant offered to show that an attempt was made upon the same night to fire a building within forty rods of defendant's barn, where buildings were close and compact, and that kerosene, paper and other combustibles were used in that attempt. Plaintiff's counsel objected to the evidence. The court sustained the objection, to which decision defendant's counsel duly excepted.

The court charged the jury, among other things, as follows: "If you find the barn was left so open or easy of access, and there was such fault on the part of the defendant as to make it possible for an incendiary to set fire to the building, that fact would charge him with liability, even if the fire was set by an incendiary. If you find the fire was set by an incendiary, but it was by negligence on the part of the defendant, which made it possible for an incendiary to set fire to it, he would be liable for the loss, but that negligence must have been such that a man reasonably careful of his own property would not have been guilty of," and submitted to them the question whether the leaving the window in the loft open with the pile of boards underneath was such negligence.

Further facts appear in the opinion.

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Statement of case.

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*Geo. B. Bradley* for the appellant. It was error to charge that, although the fire was incendiary, defendant's negligence in leaving the window of the barn open would render him liable. (33 N. Y., 571; Laws 1866, chap. 658; *People v. Utica Ins. Co.*, 15 J. R., 358, 380; *Townelle v. Hull*, 4 Comst., 140, 144.) It was error to reject the evidence offered of an attempt to fire another building near by, the same night. (*Cary v. Hotaling*, 1 Hill, 316; *Hall v. Naylor*, 18 N. Y., 588.) The evidence offered that defendant had no insurance was proper. (*Shepherd v. People*, 19 N. Y., 537.)

*Wm. B. Ruggles* for the respondent. The question put to defendant as to what he lost by the fire was properly excluded. (Whart. on Neg., §§ 458, 461, 462; Story on Bailm., §§ 63-69; S. & R. on Neg., § 21; *Dorman v. Jenkins*, 2 Ad. & El., 256; *Rooth v. Wilson*, 1 B. & Ald., 59; *Tracy v. Wood*, 3 Mason, 132.) Evidence of another attempt at arson in the neighborhood on the same night was properly excluded. (1 Phil. E., 732, note 1 [4th Am. ed.]; 2 id., 1004; *Comm. v. Brennemann*, 1 Rawle, 311, 316, 317; *Turner v. Fendall*, 1 Cranch, 132; *People v. Kennedy*, 32 N. Y., 141; *Holcomb v. Hurson*, 2 Camp., 391; *Balcetti v. Serani*, 1 Peake, 142.) Plaintiff, being a bailee of the horses burned, was entitled to bring this action. (*Kellogg v. Sweeney*, 1 Lans., 397; *Bliss v. Schaub*, 48 Barb., 339; Story on Bailm., § 94; *Rooth v. Wilson*, 1 B. & Ald., 59; *Falkner v. Brown*, 13 Wend., 63; *Freeman v. Birch*, 43 Eng. C. L., 835.) Whether defendant was negligent was a question for the jury. (*Hackland v. N. Y. C. and H. R. R. Co.*, 53 N. Y., 654; *R. R. Co. v. Stout*, 17 Wall., 657; *Ireland v. Plank-road*, 13 N. Y., 533; *Mangum v. Bkyn. R. R. Co.*, 38 id., 455; *Schwerin v. McKie*, 51 id., 180; *Dansey v. Richardson*, 3 E. & B., 165; *Coggs v. Bernard*, 2 Ld. Raym., 916; *Oldfield v. N. Y. and H. R. R. Co.*, 14 N. Y., 310; *White v. McLean*, 47 How., 193.)

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Opinion of the Court, per ANDREWS, J.

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ANDREWS, J. The common-law liability of innkeepers for loss of the property of guests by fire, occurring without the innkeeper's fault or negligence, as declared in *Hulett v. Swift* (33 N. Y., 571), was modified and limited by chapter 638 of the Laws of 1866. The case of *Hulett v. Swift* was decided in 1865, and it was held that an innkeeper was an insurer of the property committed to his custody by a guest, as against loss by fire, and the defendant in that case was made responsible for the goods of the plaintiff in his custody as innkeeper, which were consumed by fire while in the barn of the defendant. The act of 1866 seems to have been passed in view of this decision, and to mitigate the rigor of the rule declared in *Hulett v. Swift*. The statute is as follows: "No innkeeper shall be liable for the loss or destruction by fire of property received by him from a guest, stored, or being with the knowledge of such guest, in a barn or out-building, when it shall appear that such loss or destruction was the work of an incendiary, and occurred without the fault or negligence of such innkeeper."

The burden is upon the innkeeper claiming the benefit of this statute to show that the fire occasioning the loss of the goods of the guest was an incendiary one, and the absence of negligence on his part connected with the transaction. He is exempted from liability when it "shall appear" that the circumstances exist which, under the statute, exonerate him from liability. The defendant relied upon this statute as a defence in this case, and evidence was given on his part tending to show that the fire which destroyed the barn, in which at the time were the horses and wagon of the plaintiff, was the work of an incendiary, and that it was set in the hay loft, to which communication was had through a window of the barn opening into an alley in the rear, which connected two streets. This window had been left open for several weeks, and during this time lumber was piled against the barn, so that a person could easily climb upon it and enter the loft through the open window. The court submitted to the jury the question whether the defendant, in leaving the door of

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Opinion of the Court, per ANDREWS, J.

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the loft open, was, under the circumstances, chargeable with negligence, and ruled, in substance, that if the jury should find that this was a negligent act which contributed to occasion an incendiary firing of the barn, the defendant was liable for the loss sustained by the plaintiff.

The omission on the part of a bailee to use due care in protecting the property intrusted to him subjects him to liability for loss or injury resulting from such omission; and he is not exempted from responsibility, although the goods have been lost by the felony of a third person, if his negligence furnished the occasion and opportunity for its commission.

In *Coggs v. Bernard* (2 Ld. Raymond, 909) Lord HOLT, in considering the second sort of bailment enumerated by him, viz., *commodatum*, says: "But if the bailee put his horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him; but if he or his servant leave the house or stable doors open and the thieves take the opportunity of that and steal the horse, he will be chargeable; because the neglect gave the thieves the occasion to steal the horse." (See also *Dansey v. Richardson*, 3 E. & B., 165; *Schwerin v. McKie*, 51 N. Y., 180.) Thefts and burglaries are the frequent causes of the loss of goods, and a bailee may reasonably be required to take notice that the desire to obtain them is an inducement to the commission of crime, and to act in view of this fact, and exercise due care to protect them from thieves and burglars. If the horses of the plaintiff had been stolen from the barn of the defendant and his liability depended upon the existence of negligence on his part, on proof that the doors were left unlocked and open, and that no means had been taken to watch or guard the barn, it would be for the jury to say whether, under the circumstances, he was guilty of negligence. It must be admitted that the fact that the window of the hay loft was left open, and that the barn was accessible from the alley, is not very strong evidence of negligence. The crime of incendiarism is much less frequent than theft or robbery and is prompted, ordinarily, by different motives. But we cannot

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Opinion of the Court, per ANDREWS, J.

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say that the fact proved furnished no evidence upon the question of negligence. Negligence is usually a question of fact and not of law. The jury understood the condition and the location of the premises, and as practical men could judge whether proper care required the defendant to keep the window of the loft closed, as a protection against incendiaries, who might from wantonness, revenge or other motive, upon opportunity offered, set fire to the premises. I am of opinion, therefore, that the question of the defendant's negligence was a question of fact and not of law, and was properly submitted to the jury, and that negligence on the part of an innkeeper in omitting precautions which a reasonable and prudent man ought to take to guard against an incendiary fire, is such negligence as will deprive him of the benefit of the statute. The loss or destruction of the property of the guest does not in that case occur without the innkeeper's fault or negligence. Negligence which precedes and facilitates the commission of the crime, is as much within the statute as the negligent omission to protect and remove the property of the guest after the fire had commenced. Whether the fire was incendiary, or accidental, or negligent merely, was a material question on the trial. There was no direct evidence as to how it originated. Circumstances were proved on the part of the defendant which would have justified the jury in finding that it was the work of an incendiary. The fire occurred between nine and ten o'clock in the evening; the night was rainy and the fire was first discovered near the window of the loft, and it was shown that two persons, not recognized or identified, ran out of the alley from near the barn, just after the fire commenced, and disappeared. The alarm of fire had then been given and they were in a position to have heard it. Witnesses testified to appearances indicating that kerosene, or some other combustible fluid, had been put upon the floor of the barn. The defendant and his servants and the tenant, who occupied a part of the building, testified that the fire was not produced by their act or neglect. The plaintiff controverted the fact, alleged by the

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defendant, that the fire was the work of an incendiary. The evidence as to the suspicious conduct of the two men was not denied, but evidence was given on the part of the plaintiff tending to contradict the testimony of the defence as to the presence of kerosene or other burning fluid on the barn floor; and one of the plaintiff's witnesses testified that the defendant's hostler was accustomed to smoke in the barn, and that he saw him, about eight o'clock on the night of the fire, lying on the bedding in one of the rear stalls smoking a pipe, and reading by the light of a lamp. It appears sufficiently from this reference to the evidence that the character of the fire, whether incendiary or not, was sharply contested. Each party has the right to show any circumstance in support of his theory as to the origin of the fire, which legitimately tended to establish it.

The defendant called one Trenchard as a witness, and offered to show by him that on the next street west, within forty rods of the barn which was burned, an attempt was made during the same night to fire a building, at a point where the buildings were close and compact, and that kerosene, paper and other combustibles were used in the attempt. This evidence was objected to as immaterial, and it was excluded by the judge. I am of opinion that the evidence offered was admissible. The offer was to show an actual attempt on the same night to burn another building in the same village, by the use of similar means, as the evidence on the part of the defendant tended to show, were used in firing the barn.

The fact in issue, to which this evidence related, was whether the defendant's barn was fired by an incendiary. If there had been a series of incendiary fires in that village previous to and near the time of the fire in question, could not this fact have been shown in aid of the defence? It cannot be denied that in connection with the other circumstances proved, it would have produced upon the mind a strong conviction that the fire in the defendant's barn was also caused by an incendiary.

The proof offered was not merely of facts tending to estab-

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Opinion of the Court, per ANDREWS, J.

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lish a presumption, that an attempt to fire another building on the same night had been made, but of an attempt made, which failed. There was here no uncertainty as to the collateral fact sought to be proved, and if the fact had been admitted that incendiaries were at work in another place in the village on the same night it would have had a direct and material bearing upon the question as to the character of the fire which destroyed the barn.

This is not the case of the trial of a person charged with the crime of arson in burning the barn. If, on such a trial, it was sought to show, as an independent and disconnected fact, that the prisoner on the same night attempted to burn another building in the same village, it would be inadmissible under the general rule that on the trial of a prisoner for one crime, proof cannot be given that he had committed another. There are some well known exceptions to this rule when the object is to show the *quo animo*, as to the transaction on trial. But in investigating in a civil suit a question depending solely upon circumstantial evidence, it would, I think, be holding too strict a rule to refuse evidence such as was offered in this case, which is connected with the principal fact by circumstances which naturally tend to establish it.

There is no fixed and definite rule by which it can be determined whether a collateral fact is so remote as to be inadmissible to support the principal fact sought to be established. The question must, to a considerable extent, be decided in each case, on its own circumstances, and we are of opinion that the proof offered, to which we have referred, ought to have been admitted.

The judgment should be reversed and a new trial ordered.

All concur.

Judgment reversed.



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Statement of case.

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THE ATLANTIC AND PACIFIC TELEGRAPH COMPANY, Respondent, v. JAMES A. BARNES et al., Appellants.

The sureties upon a bond given by an employe to his employer, conditioned that the former will faithfully account for all moneys and property of the latter coming to his hands, are not discharged from subsequent liability by an omission on the part of the employer to notify them of a default on the part of their principal known to the employer, and a continuance of the employment after such default, in the absence of evidence of fraud and dishonesty on the part of the employe.

*It seems*, that the rule is otherwise where the default is of a nature indicating want of integrity in the employe, and this is known to the employer.

(Argued February 15, 1876; decided March 21, 1876.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York in favor of plaintiff, entered upon an order denying a motion for a new trial and directing judgment upon a verdict. (Reported below, 7 J. & S., 40.)

This action was upon a joint and several bond executed by defendants to the plaintiff upon the employment by the latter of defendant William E. Barnes.

The bond was conditioned, among other things, that said Barnes should "faithfully account for all moneys and property belonging to said Atlantic and Pacific Telegraph Company which shall come to his hands, whether the same shall be paid or delivered to him by said Atlantic and Pacific Telegraph Company to be disbursed or used for its account, or shall be received by him from other persons for the use and benefit of said Atlantic and Pacific Telegraph Company, or shall come to his hands in any other manner."

The bond in question was executed, and Barnes entered into the employment of defendant, December 22, 1873. It was admitted on the trial, that on January 30, 1874, Barnes was in default to the plaintiff in the sum of fifteen dollars and ninety-two cents, of which plaintiff had knowledge, but

## Statement of case.

did not notify the sureties, and continued Barnes in its employ until March 24, 1874, when he was discharged. His default at that time amounted to \$269.67.

A motion on the part of defendants to dismiss the complaint was denied, and the court directed the jury to find a verdict for the plaintiff for the full amount. Defendants duly excepted. A verdict was rendered accordingly.

Exceptions were ordered to be heard at first instance at General Term.

*Samuel Hand* for the appellants. Defendants were discharged from all liability upon their bond after their principal's default had been discovered by his employer, he having retained him in his employ. (*Rallston v. Mathews*, 10 C. & F., 934; *Phillips v. Foxall*, L. R., 7 Q. B., 666; *Sanderson v. Asten*, L. R., 8 Eq., 83; Story Eq. Jur., 324-326; 2 Vern., 518; 3 Eng., 272; 11 Am., 237; De Colyer on Guar. and Sec. [5th Am. ed.], 434; *Graves v. Nat. Bk.*, 10 Bush [Ky.], 23.) There was an implied covenant on the part of the employer with defendants that he would use ordinary care and diligence during the employment of their principal. (Fell on Guar. and Sur., 229.) Plaintiff's admissions were enough to discharge defendants from all liability after the first default. (2 Vern., 518; 3 Eng. R., 272; L. R., 7 Q. B., 66; L. R., 8 Eq., 73; *Burgess v. Eve*, L. R., 13, 450, 458; *Hunt v. Roberts*, 45 N. Y., 696; 2 Pars. on Con., 31; *Ress v. Berrington*, 2 Ves. Jr., 540; Burge on Suretyship, 263; 18 Ves., 20; 7 Hill, 250; 9 Cl. & F., 1, 45, 47; Fell on Guar. and Sur., 449, 518.)

*Charles Edward Souther* for the respondent. Nothing in plaintiff's admissions constituted a defence to the action. (*People v. Berner*, 13 J. R., 383; *Alb. D. Ch. v. Vedder*, 14 Wend., 165; *Looney v. Hughes*, 26 N. Y., 522; *Schroepell v. Shaw*, 3 id., 446; *Remsen v. Beekman*, 25 id., 552, 557; *B. R. Bk. v. Page*, 44 id., 453; *McKenzie v. Ward*, 58 id., 541; *P. and C. R. R. Co. v. Schaeffer*, 59 Penn., 356.)

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Opinion of the Court, per MILLER, J.

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MILLER, J. This action was upon a bond executed by the defendants for the benefit of one of them, who was an employe of the plaintiff. About one month after the bond was given, the principal was in default for a small amount, of which the plaintiff had knowledge. He did not notify the sureties of such default, but continued to employ the principal until the default had increased to the amount claimed in the complaint. It is insisted that the failure of the plaintiff to give such notice exonerated the sureties from liability for any subsequent defalcation or dishonesty of the principal during his continuance in plaintiff's service, and that by reason of this neglect they were discharged from liability. The principle contended for is not without sanction, and the question to be determined here is to the application of certain established rules, and the adjudications of the courts to the facts presented upon this appeal.

Judge STORY, in his work on Equity Jurisprudence (§ 324), lays down the rule that "any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditors, either by surprise or by withholding proper information, will undoubtedly furnish sufficient ground to invalidate the contract." The English authorities, especially those of a recent date, go very far to uphold the position that the employer is bound to notify those who have become guarantors for the faithful discharge of the duties which the employe has assumed to perform, of any defalcation or dishonesty on the part of the latter, as will be seen by a brief reference to some of the leading cases. In *Railton v. Mathews* (10 Clark & F. [House of Lords Cases], 934), an action was instituted to avoid a bond executed for the fidelity of a commission agent to his employers, upon the ground of concealment of material circumstances affecting the agent's credit prior to the date of the bond, and which if communicated to the surety would have prevented him from undertaking the obligation, and it was laid down, that mere non-communication of circumstances affecting the situation

of the parties, material for the surety to be acquainted within the knowledge of the person obtaining the surety bond was undue concealment, though not willful or intentional, or with a view of any advantage to himself. In this case the concealment alleged was prior to the execution of the bond, and hence it bears a different aspect than if the facts concealed had transpired after the bond had been executed.

In *Phillips v. Foxall* (L. R., 7 Q. B., 666), where there was a continuing guaranty of the honesty of a servant, it was held that if the master discovers that the servant has been guilty of dishonesty in the course of the service, and instead of dismissing the servant he chooses to continue him in his employ without the knowledge and consent of the surety, express or implied, he cannot afterward have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during his subsequent service. A later case, *Sanderson v. Aston* (L. R., 8 Exch., 73), upon the authority of *Phillips v. Foxall*, upholds substantially the same principle. (See, also, *Burgess v. Eve*, L. R., 13 Eq., 450, 458; *Montague v. Tidcombe*, 2 Vern., 518.)

The early adjudicated cases in this State have not gone to the extent of the rule laid down, perhaps for the reason that no case of palpable dishonesty, known to the employer, was actually presented which required the courts to determine the precise question whether notice was demanded under such circumstances. It is not necessary to examine them in detail, as those as well as other cases bearing on the question are fully considered and sharply criticised in the opinion of Judge FOLGER, in *McKecknie v. Ward* (58 N. Y., 541). In that case an action was brought upon a bond in the penalty of \$2,000, conditioned for the performance by the principal of a contract between him and the plaintiffs, which was recited in the bond, and it was held that a contract of suretyship for the performance, by a vendee, of a continuing agreement of purchase and sale, by which goods purchased from time to time, as required, are to be paid for at stated periods, is not discharged by mere forbearance on the part of the

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Opinion of the Court, per MILLER, J.

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vendor, to enforce payment as provided for by the contract, without a binding agreement for the extension of time. It was there said that mere indulgence of the creditor in such a case was not enough to discharge the surety; that beyond the bare neglect of the creditor to enforce payment, there must be some connivance or gross negligence amounting to willful shutting of the eyes to fraud. The case was distinguished from *Phillips v. Foxall* and *Sanderson v. Aston* (*supra*), as those related to master and servant, and the obligation incurred was that there should be no breach of duty, and for the honesty of the principal. If, in such a case as the one last cited, connivance and gross negligence will discharge the surety, it would seem that quite as strong reasons exist for discharging sureties where it is known to the master that the servant has been dishonest, and has appropriated to his own use funds which he has received by virtue of his employment, and, with full knowledge of such a dereliction of duty, continues to allow such servant an opportunity to increase his defalcation. Such conduct of the master would be a clear violation of the rule which obligates him to do no act which would injure or impair the liability of the sureties.

The bond executed by the defendants in this case provided that the principal should faithfully account for all moneys and property which should come to his hands, and the admission made upon the trial shows that he was in default to the knowledge of the plaintiff, and no notice given of said default to the sureties. The nature of such default and how, or under what circumstances it arose, is not proved, and we are left to inference to determine its origin and real character. In *Phillips v. Foxall* (*supra*) and kindred cases, the dishonesty of the servant was conceded, and no question was presented as to that fact. While here it is not entirely manifest that the default was occasioned by dishonesty, perhaps temporary absence, sickness or some unavoidable accident may have prevented an accounting by the principal, and delayed payment of the amount in arrears, and it may be

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accounted for on the assumption that there was no breach of honesty or want of integrity on the part of the servant. If the default of the principal was merely casual, and without fraud or dishonesty, then, within the rules laid down, there was no concealment of material facts, or suppression of proper information, which rendered the contract of the sureties invalid. Where such a defence is interposed the proof should be reasonably clear that the delinquency was caused by dishonest conduct or a gross violation of the obligations imposed by the bond. We think that there is a want of evidence in this respect, and, for this reason, the court was right in denying the motion to dismiss the complaint, and in directing a verdict for the plaintiff.

The judgment should be affirmed, with costs.

All concur, except ALLEN and EARL, JJ., not voting.

Judgment affirmed.

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JACOB LEVY et al., Respondents, v. CALEB A. BURGESS,  
Appellant.

Where, upon failure of one party to perform his contract within the time specified, the time is extended upon a certain condition, a performance of the condition is requisite to enable the party to avail himself of the extension.

Defendant contracted to purchase of plaintiffs certain railroad bonds indorsed by the State of A., to be delivered and paid for at a specified time and place. Defendant attended at the time and place to receive the bonds, but plaintiffs were unable to perform. Defendant informed plaintiffs that they could deliver within a certain time to his brokers, M. & T., bonds, the indorsements upon which were signed by the governor of A. *as governor*; said brokers were authorized to receive and pay for the bonds if so signed, but not otherwise. Plaintiff had contracted with H. for the bonds, who offered bonds, a portion of which were signed by the governor, but without the addition of his name of office. H. allowed plaintiff to take the bonds to tender to M. & T., under an agreement that, if accepted, plaintiff would accept them as a good delivery on the contract of H. The bonds were tendered within the time, but M. & T. refused to accept

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because not indorsed as prescribed, and the bonds were returned to H. In an action upon the contract, *held*, that by the failure of plaintiffs to perform at the time agreed upon, defendant was discharged unless he waived his right or extended the time; that to avail themselves of the extension plaintiffs were bound to comply with the condition imposed, and a tender of bonds of a different description, although the indorsement was a valid indorsement of the State, was insufficient; also, that a tender to M. & T. of bonds, which, as plaintiffs knew they were not authorized to accept, was not equivalent to a tender to defendant.

*Levy v. Burgess* (8 J. & S., 431) reversed.

(Argued February 17, 1876; decided March 21, 1876.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York affirming a judgment in favor of plaintiffs, entered upon a verdict. (Reported below, 6 J. & S., 431.)

This action was brought upon the following contract, signed by defendant:

“NEW YORK, *August* 28, 1872.

“\$20,000.

“I have bought of Levy & Borg twenty thousand dollars of Alabama and Chattanooga railroad first mortgage eight per cent bonds, indorsed by the State of Alabama, numbers to run below four thousand, July, 1872, coupons on, at eighty and one-half cents on the dollar, payable and deliverable in thirty days from date, fixed ‘flat,’ with interest at the rate of     per cent per annum, either party having the right to call for deposits of ten per cent during the pendency of this contract.

“C. A. BURGESS.”

The parties agreed upon the time and place of performance, to wit, 12 o'clock, at noon, at plaintiffs' office. Defendant's evidence was to the effect that upon the day when the contract matured, at the hour fixed, he called at plaintiffs' office to receive and pay for the bonds; he was informed by one of the defendants that they had not got the bonds; that the person from whom they bought had tendered bonds which they had refused to accept, because they were not properly indorsed

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by the State of Alabama, the governor of that State not having signed the indorsement as governor, but only in his own name. Defendant called again at one o'clock and was informed the plaintiffs had not the bonds. He then told them that they might, up to quarter past two, deliver the bonds to Meserole & Trumbull, defendant's brokers, if they were signed by the governor as governor. Said firm were authorized by defendant to accept and pay for the bonds if so signed, but not otherwise. Plaintiffs had contracted with one Hoenig for the bonds. The indorsements upon a portion were as follows:

"In pursuance of certain acts of the general assembly of the State of Alabama, namely, an act approved February 19, 1867, entitled 'An act to establish a system of internal improvements in the State of Alabama,' and an act approved September 22, 1868, entitled 'An act to amend the law to establish a system of internal improvements in the State of Alabama,' and an act approved November 17, 1868, entitled 'An act relating to the Willis Valley Railroad Company, and the North-east and South-west Alabama Railroad Company.'

"The State of Alabama hereby indorses this bond, and becomes liable for the payment of the principal and interest thereof, the Alabama and Chattanooga Railroad Company having complied with the conditions upon which the undersigned, governor of the State of Alabama, is required, on the part of the State, to give such indorsement.

"In witness whereof, the undersigned, governor of the State of Alabama, has hereto set his hand, and caused [L. s.] to be affixed hereto the seal of the State of Alabama, this first day of January, A. D. 1869.

"W. H. SMITH."

Plaintiffs agreed to accept them if accepted by Meserole & Trumbull, and Hoenig, upon this agreement, authorized a tender of them, and went with one of plaintiffs, about two o'clock, to the office of said brokers for that purpose, where a tender was made, but they refused to accept because not signed as required by defendant's instructions to them, which



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they stated as the reason for refusal. The bonds were handed back to Hoenig, who retained them until October seventh, when they were taken by plaintiffs. The bonds were subsequently sold at a price below the contract-price, and this action was brought to recover the deficiency.

At the close of the evidence, defendant's counsel moved to dismiss the complaint, on the ground that no tender had been proved, which motion was denied, and said counsel duly excepted. Said counsel requested the court to submit to the jury the question, among others, whether a tender had in fact been made. This request was denied, and the court directed a verdict for plaintiffs for the amount of the deficiency, to which defendant's counsel duly excepted.

*Theron G. Strong* for the appellant. A tender of bonds by plaintiffs on September 27, 1872, was necessary to establish a cause of action. (*Nelson v. Plimp. F. P. E. Co.*, 55 N. Y., 480; *Williams v. Healy*, 3 Den., 363; *Baker v. Higgins*, 21 N. Y., 397; 2 Smith's L. C., 8; *Glazebrook v. Woodrow*, 6 T. R., 366.) The tender made was not good because plaintiffs did not own or have possession of any bonds to tender. (*Champion v. Joslyn*, 44 N. Y., 653; *Kortright v. Cady*, 21 id., 343, 354; *Hume v. People*, 8 East, 168; *Bklyn. Bk. v. Degraw*, 23 Wend., 342; *Wilder v. Seelye*, 8 Barb., 408; *Knight v. Beach*, 7 Abb. Pr. [N. S.], 241.) The court erred in excluding evidence to show that the contract was made with reference to bonds signed by "W. H. Smith, governor," and no others. (*Freeland v. Burt*, 1 T. R., 201; Greenl. on Ev., § 286; *Cary v. Thompson*, 1 Daly, 35; *French v. Carhart*, 1 N. Y., 96, 102; *Moore v. Meacham*, 10 id., 207, 211; *Chester v. Bk. of Kingston*, 16 id., 336; *Hinneman v. Roserback*, 39 id., 98; *Field v. Munson*, 47 id., 221.)

*S. Sidney Smith* for the respondents. The proceedings for the sale of the bonds and the sale were regular. Plaintiffs were not obliged to give defendant notice. (*Dustan v. McAndrew*,

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44 N. Y., 72; 10 Bosw., 130; *Hayden v. Demets*, 53 N. Y., 426; *Pollen v. Le Roy*, 30 id., 549; *Lewis v. Greider*, 49 Barb., 606.) The tender of the bonds was sufficient. (*Champion v. Joslyn*, 44 N. Y., 653.) Defendant, having declined the tender and stated the ground of his refusal, is bound thereby, and cannot now claim an advantage from any other alleged informality. (Benj. on Sales [1st Am. ed.], § 716; *Carman v. Pultz*, 21 N. Y., 547, 561; *Gould v. Banks*, 8 Wend., 562.)

ANDREWS, J. The contract between the parties was mutual, and it was to be performed by each at the same time. The plaintiffs bound themselves to deliver the bonds on the day named in the contract, and the defendant, at the same time, was to pay the purchase-price. The parties, after the contract was made and before its maturity, fixed upon an hour when they would meet at the office of the plaintiffs, on the day the contract matured, to perform it. This became a part of the agreement between them and had the same force and effect as if the particular time and place of performance had been named in the original contract. (*Franchot v. Leach*, 5 Cow., 506; *Davis v. Talcott*, 14 Barb., 612.) The plaintiffs, therefore, in order to recover against the defendant, were bound to show a performance of the contract on their part, by delivering or tendering the bonds to the defendant at the time and place appointed, or that performance at that time was prevented or waived by the defendant. (*Williams v. Healey*, 3 Den., 363; *Nelson v. Plimpton Fire Proof Elevating Co.*, 55 N. Y., 480.) The judge, on the trial, directed a verdict for the plaintiffs, and the propriety of this direction is to be tested by assuming that the jury would have found the contested facts in favor of the defendant. The defendant testified — and in this respect there is no serious discrepancy between his testimony and the plaintiff's — that he went to the plaintiffs' office at the hour appointed, on the day the contract matured, to receive and pay for the bonds, and was informed by the

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plaintiffs that they had not yet received them. The plaintiffs, when the contract was made, did not own the bonds they agreed to sell, but they afterwards contracted to purchase them of one Koenig, to enable them to perform their contract with the defendant. The plaintiffs' contract was to deliver bonds of "The Alabama and Chattanooga Railroad," indorsed by the State of Alabama. They informed the defendant, at the interview referred to, that the person from whom they had bought the bonds, had tendered bonds on his contract which they had refused to accept, the objection being that a part of them were not properly indorsed by the State of Alabama, for the reason that the governor of that State had not signed the indorsement as governor, but in his own name, without adding his official designation. The General Term was clearly right in holding that this objection was not well founded, and that the indorsement was the act and contract of the State. The instrument of indorsement purports to bind the State; it refers to the acts of assembly under which the indorsement by the governor on the part of the State was authorized. The *in testimonium* clause recites that: "The undersigned, governor of the State of Alabama, has hereto set his hand and caused to be affixed hereto the seal of the State of Alabama," etc., and the seal of the State was affixed. It was the obligation of the State, and not of the person whose name was signed to it, and the addition of his name of office to his signature was unnecessary.

Delivery of bonds indorsed in this form would have been a good delivery under the contract with the defendant. But the plaintiffs neither owned or had in his possession these or any bonds called for by his contract with the defendant, at the time the plaintiffs, pursuant to the arrangement between the parties, was to deliver them. They at that time did not deliver or offer to deliver them. They were not in a situation to perform their contract, and the defendant on his part was ready to take the bonds. It was no excuse for the failure of the plaintiffs to perform, that Koenig had not performed his contract, or that the plaintiffs declined to receive the bonds

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tendered by him under a mistake of law. The defendant was no longer bound, unless he waived his rights or extended the time of performance by the plaintiffs. It is quite evident, that at the time of this first interview between the parties, they both understood that bonds signed by the governor, without his official designation, would not be a good delivery under the contract. The defendant, as he testifies, left the plaintiffs' office and returned within a short time, and then informed the plaintiffs that they could deliver the bonds for him signed by Smith, as governor, to Meserole & Trumbull, brokers, up to a quarter past two o'clock of that day, who would receive and pay for them. The plaintiffs, before the time limited, offered to Meserole & Trumbull bonds of the requisite amount, but on twelve of them the indorsements was signed by Smith, without the addition of his name of office. M. & T. refused to accept them on the ground that they were not authorized by the defendant to accept bonds so indorsed. The bonds thus tendered to M. & T. were owned by Koenig, who allowed the plaintiffs to take them to tender to the brokers, under an agreement with the plaintiffs, that if the bonds were accepted by Meserole & Trumbull, the plaintiffs would accept them as a good delivery on their contract with Koenig. Immediately upon the refusal of M. & T. to accept them, they were returned to Koenig, who held them for some days when the plaintiffs took and paid for them.

The plaintiffs cannot avail themselves of the tender made to Meserole & Trumbull as a performance of their contract with the defendant. When the permission was given to the plaintiffs to deliver bonds on the defendant's account to M. & T., the plaintiffs were in default, and if they acted upon it they were bound by the condition imposed, and a tender of bonds of a different description from those specified in the permission would be unavailing and nugatory. It would not be sufficient to tender other indorsed bonds, although of the same value, and creating the same obligation. Moreover, M. & T. had only a special authority which was known to

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the plaintiffs, and a tender to them of bonds which they were not authorized to accept, was not equivalent to a tender to the defendant. At no time during the day the contract matured, did the plaintiffs own the bonds with which to fulfill their contract. They were intrusted by Koenig with bonds for the special purpose of tendering to Meserole & Trumbull, and as soon as the tender was refused they were handed back to the owner.

The evidence, on the part of the plaintiffs in respect to the arrangement for the delivery of the bonds to Meserole & Trumbull, tends to show that there was no restriction as to the particular form of indorsement, and that the bonds offered were such as the defendant agreed to accept. But we are of opinion that the question whether the tender to Meserole & Trumbull was made in accordance with the arrangement between the parties, was one of fact and should have been submitted to the jury, and that for this reason the judge erred in directing a verdict.

The judgment should be reversed and a new trial ordered, costs to abide event.

All concur.

Judgment reversed.

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HENRY B. BARNES et al., Respondents, v. JACOB H. MOTT,  
impleaded, etc., Appellant.

Where the owner of premises conveyed to him subject to a mortgage, in ignorance of the lien thereon of a judgment against a former owner, subsequent to the mortgage, pays the mortgage and causes the same to be satisfied of record, he is entitled to have the same reinstated as a lien prior and paramount to the lien of the judgment.

Where lands incumbered by a judgment are conveyed with covenants of warranty to a purchaser for full value, the grantee and his successors in interest occupy a position similar to that of sureties for the judgment debtor and are entitled to the same equities. A release by the judgment creditor without their consent and with knowledge of their rights

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of any security to which, in equity, they would be entitled on payment of the judgment, discharges the lien of the judgment.

Accordingly *held*, where, after such a conveyance, the judgment debtor gave an undertaking on appeal from the judgment securing the amount thereof and staying proceedings to enforce the same, and after affirmance of the judgment the judgment creditor, with knowledge of the equitable rights of the owner and without his consent, released the sureties in the undertaking, that thereby the lien of the judgment was discharged.

*It seems*, that the same principle would apply without regard to the covenants in the deed.

(Argued February 21, 1876; decided March 21, 1876.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, affirming a judgment in favor of plaintiffs, entered upon a decision of the court at Special Term.

This action was brought to restrain the sale upon execution of certain premises in the city of New York owned by plaintiff Henry M. Barnes, and to have the lien of the judgment upon said premises discharged; also to restore the lien of a mortgage upon said premises alleged to have been satisfied by mistake.

The facts as found by the court are, in substance, as follows:

The judgment in question was obtained by one Orchard against defendant Britton and one Binninger on the 2d day of February, 1864. At that time Britton was the owner of the premises referred to, which were subject to a mortgage, and the judgment became a lien thereon. In the latter part of 1864, Britton sold and conveyed the premises, with full covenants and warranty, subject to said mortgage, to one Burr, who purchased in ignorance of the judgment and paid the full value therefor. Burr died in the following year and his devisees sold and conveyed the property to a Mrs. Ludlam, one of the plaintiffs herein, who, in the year 1873, sold and conveyed it to plaintiff Henry B. Barnes. Said devisees, prior to the conveyance to Mrs.

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Ludlam, in ignorance of the judgment, paid off the mortgage and the same was satisfied of record. At the time of the conveyance to Burr an appeal from the said judgment to the General Term of this court was pending. In October, 1868, the judgment was affirmed by the General Term, and an appeal was thereupon taken to the Court of Appeals. On this latter appeal two of the defendants, Wilson and Darrow, as sureties, executed an undertaking securing the judgment, whereby all proceedings to enforce said judgment were stayed during the pendency of the appeal. In January, 1873, the judgment was affirmed by the Court of Appeals. Immediately thereupon an action was commenced against Wilson and Darrow on their undertaking. In this action Wilson and Darrow were defended by the defendant Wagner, as attorney, who, in March of the same year, settled with the owners of the judgment and took an assignment thereof to himself, and at the same time obtained a discontinuance of the action against the sureties. Within a day or two thereafter Wagner, by a release executed under his hand and seal, released Wilson and Darrow from all liability on the undertaking. Wagner then assigned the judgment to the defendant Mott, who caused an execution to be issued thereon by Wagner, as his attorney, to the sheriff of the city and county of New York. The sheriff levied upon the premises in question and advertised the same for sale, whereupon this action was commenced.

Upon said facts the court directed judgment reinstating the lien of the mortgage and declaring it prior and paramount to the judgment, and also adjudging the premises free and discharged from the lien of the judgment, and directing a perpetual stay of execution on said judgment as against said premises.

*Wm. F. Shepard* for the appellant. The sureties on an undertaking on appeal, as between the original parties are entitled to be subrogated to all the rights of the judgment creditor, both as against the judgment debtor and the real

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Opinion of the Court, per ALLEN, J.

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estate on which the judgment is a lien. (*Mathews v. Aiken*, 1 N. Y., 595–599; *Craythorne v. Swinburne*, 14 Ves., 159; *Lewis v. Palmer*, 28 N. Y., 271–276; *Wells v. Kelsey*, 25 How., 384; *Munn v. Barnum*, 2 Abb., 409, 410; *Hinckley v. Kretz*, 58 N. Y., 583, 590, 591; 1 Story's Eq. Jur., § 499, note 5.) Plaintiffs' grantor took the land subject to the lien of the judgment. (*Wood v. Chapin*, 13 N. Y., 509; *Webster v. Van Steenberg*, 46 Barb., 211; *Shell v. Telfore*, 4 N. Y. Leg. Obs., 307; 1 Pars. on Bills, 261; *Moyer v. Hinman*, 13 N. Y., 183.) The principle of suretyship will not apply between a purchaser of land charged with the lien of a judgment, and the sureties to the judgment creditor on appeal from that judgment. (Pitman, Prin. and Sur., 1, 2; Burge on Suretyship, 1–15; 2 Burr. L. D., 500; 12 Barb., 583.)

*Addison Brown* for the respondents. Burr and his successors stood in the position of sureties, in respect to the premises conveyed. (*Gahn v. Niemcewicz*, 3 Paige, 614; 11 Wend., 312; *Bk. of Albion v. Burns*, 46 N. Y., 174; 25 id., 481; *Ingalls v. Morgan*, 10 id., 178; *Chester v. Bk. of Kingston*, 16 id., 336; *Fellow v. Prentice*, 3 Den., 521; *Silver Lake v. North*, 4 J. Ch., 370; *Clowes v. Dickenson*, 5 id., 235; *Gouverneur v. Lynch*, 2 Paige, 300; *Guion v. Knapp*, 6 id., 35; *Howard v. Halsey*, 4 Seld., 571; 4 Sandf., 565; *James v. Hubbard*, 1 Paige, 235; *Johnson v. Zink*, 51 N. Y., 331.) Plaintiff's equities were superior to those of the sureties in the undertaking. (*Armstrong's Appeal*, 5 W. & S., 352; *Parsons v. Briddock*, 2 Vern., 608; *Wright v. Morley*, 11 Ves., 12, 22; *Burns v. Huntington Bk.*, 1 Penn. St., 395; *Pitt v. Nathan*, 1 W. & S., 352; *Brandenburgh v. Flynn*, 12 B. Mon., 397; *Schentege's Appeal*, 49 Penn. St., 23; *Hinckley v. Kreitz*, 58 N. Y., 583; *Delareque v. Norris*, 7 J. R., 358; *Champlin v. Laytin*, 6 Paige, 195; *Meyer v. Clark*, 2 Daly, 497; 46 N. Y., 174.)

ALLEN, J. So much of the judgment as restores the mortgage upon the premises now owned by the plaintiffs, paid off



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and satisfied by the devisees of Burr, the then owners, and reinstates the same as a lien upon the mortgaged premises, prior and paramount to the lien of the judgment recovered by Orchard and assigned to the defendant, is clearly right. Upon payment of the mortgage by the then owners of the premises, they were entitled to all the rights of the mortgagee, and to an assignment of the mortgage; and having caused the same to be satisfied under circumstances authorizing an inference of a mistake of fact, equity will presume such mistake and give the party the benefit of the equitable right of subrogation. To do so in this case is to prevent manifest injustice and hardship, and interferes with no superior intervening equities. (*Hyde v. Tanner*, 1 Barb., 76; *Runyan v. Stewart*, 12 id., 537, per WELLS, J.)

The other and principal question presented by the appeal is more difficult of solution. The plaintiffs, as successors in interest of Burr, the grantee of Britton, the judgment debtor, occupy the same position and have the same rights and equities that he would have had had he continued the owner of the premises upon which the judgment was a lien. The plaintiffs are not technically sureties for the judgment debtor, but, in virtue of their ownership of lands incumbered by the judgment against the grantor under whom they claim title, who conveyed the same for full value with covenants of warranty, they occupy a position very similar to that of sureties, and are entitled to the same equities, so far as they can be administered consistently with the rights of others. The doctrine of subrogation or substitution, at first applied in behalf of those who were bound by the original security with the principal debtor, has been greatly extended, and the principle, modified to meet the circumstances of cases as they have arisen, has been applied in favor of volunteers intervening subsequent to the original obligation, and as between different classes of sureties, and in the marshaling of assets, and prescribing the order in which property and funds shall be subjected to the discharge of different classes of obligations, and as between different classes of creditors,

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so as to do substantial justice and equity in each case. (Story's Eq. Jur., §§ 633, 635, 636; *Bank of United States v. Winston*, 2 Brock, 252; *Ingalls v. Morgan*, 6 Seld., 179.)

As grantees of the land with covenants against incumbrances, broken at the instant the grant was made, they might, at any time, but for the stay by the appeal, have paid off the incumbrance and had their action for the full amount paid. (*Prescott v. Freeman*, 4 Mass., 627; *Hall v. Dean*, 13 J. R., 105; *Delavergne v. Norris*, 7 id., 358; *Dimmick v. Lockwood*, 10 Wend., 142.) But, without respect to the covenants in their deed, the plaintiffs, as the owners of property charged with the debt of another, would, upon payment of the incumbrance, have become subrogated to all the rights of the judgment creditor, and to all the securities which he held for the payment of the judgment. (Story's Eq. Jur., § 1227; *Pardee v. Van Auken*, 3 Barb., 534; *Ellsworth v. Lockwood*, 42 N. Y., 89; *Wright v. Morley*, 11 Ves., 12; *Parsons v. Briddock*, 2 Vern., 608.)

Had there been other lands incumbered by the same judgment, whether owned by the judgment debtor or conveyed by him to others, the plaintiffs might have compelled the sale of such lands in that order which would have preserved the rights and equities of all; that is, the sale of the lands owned by the debtor first in order, and then those which had been sold by the debtor in the inverse order of alienation. (*Howard Ins. Co., v. Halsey*, 4 Seld., 271; *Huion v. Knapp*, 6 Paige, 35; *Gouverneur v. Lynch*, 2 Paige, 300.) Applying the same principles, had the judgment creditor — with knowledge of the plaintiffs' rights — disqualified himself from transferring to the plaintiffs any securities to which in equity they would have been entitled upon the payment of the judgment, or without their consent released any such securities, or property primarily liable, or dealt with the principal to the prejudice of their rights, the lien of the judgment would have been discharged in equity. (*Stevens v. Cooper*, 1 J. C. R., 425; *Bank of Albion v. Burns*, 46 N. Y., 170; *Chester v.*

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*The Bank of Kingston*, 16 id., 336.) These principles are very familiar and of frequent application to all cases of suretyship, or in which parties are pledged, either personally or by incumbrances upon their property, for the debts of others, and there is no distinction recognized between those originally bound and those becoming by some subsequent act or assent upon their part. The plaintiffs at any time, upon payment of the judgment and becoming subrogated to the rights of the judgment creditor, would have succeeded to the remedies which the latter would have had against the sureties, upon the appeal from the judgment; that was one of the securities which he had and was bound to hold for the benefit of any who stood in the equitable relation of sureties for the payment of the judgment, either by reason of their personal obligation or because their property was bound. Sureties are entitled to be subrogated to the rights of the creditor as against all subsequent sureties. (*Parsons v. Bridgock*, *supra*.) The sureties upon the appeal intervened as volunteers, and by their interposition got time for the principal debtor, to the prejudice of the prior sureties and of the plaintiffs, whose lands were bound for the judgment, and they must be considered in equity as in the same condition as any other sureties voluntarily undertaking for the payment of the judgment. Their obligation inured to the benefit not only of the creditors, but of any and all who had become before them in any way sureties for the payment of the debt. The plaintiffs, therefore, were entitled to the benefit of that undertaking, and the discharge of it without their consent was, in equity, a discharge of their property from the lien of the judgment. (*Pott v. Nathans*, 1 W. & S., 155; *Armstrong's Appeal*, 5 id., 352; *Burns v. Huntingdon Bank*, 1 P. & W. [Penn.], 395; *Schnitzel's Appeal*, 49 Penn. St., 23.) The principle of the cases cited from the Pennsylvania reports was adopted and applied, and the doctrine of subrogation. and the rights and equities of different classes of sureties as between each other, well considered in *Hinckley v. Kreits* (58 N. Y., 583.)

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The judgment creditor by discharging the sureties upon the appeal, without the consent or privity of the plaintiffs, and with knowledge of their rights, entitled them to the relief demanded in this action. The obligation and undertaking of the sureties upon the appeal were as much for the benefit of the plaintiffs as of the judgment creditor, and the latter could not discharge the sureties, and at the same time keep the plaintiffs or their property charged with the debt.

Judgment must be affirmed.

All concur, except CHURCH, Ch. J., not voting.

Judgment affirmed.

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JOHN LUTES et al., Respondents, v. MARTIN BRIGGS et al.,  
Commissioners, etc., Appellants.

The board of public works of the city of R. passed an ordinance providing for the deepening and enlarging of a sewer, by enlarging a portion, constructing a tunnel under a race and deepening another portion. Bids were advertised for and received which were so much per foot for "open cut" and so much for tunneling. The contract was awarded to S., a portion to be "open cut" and the portion under the race tunneled. The board subsequently resolved that the work should be entirely tunneled, and a contract was entered into with S., without a readvertisement, at the figures in his bid, which were five dollars per foot more for tunneling than for "open cut." In an action brought by persons assessed for the sewer, wherein judgment was obtained restraining the payment of any money for tunneling, save for the portion under the race; *held*, that the contract entered into was authorized by the ordinance, as the provision for deepening included any mode by which the work could be accomplished which the board, in the exercise of a reasonable discretion, should deem proper; that as the petition presented did not designate any particular mode of doing the work, there was no violation of the provision of the act of 1872 amending the city charter (§ 7, chap. 771, Laws of 1872), conferring upon the owners the right to designate the kind of improvement; that having complied with the provision of said act (§ 8), requiring advertisements for proposals, the board was not required to advertise again, but had the authority to make the change before a contract in writing was entered into, and to adopt the proposal for tunneling in the accepted bid.

Also, *held*, that the action could not be maintained by the plaintiffs, as by the provision of the charter of 1861 (§ 207, chap. 103, Laws of 1861), in

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case a greater amount was assessed and collected than was required for the improvement it was to be apportioned by the council and paid to the owners of property assessed, the remedy of plaintiffs was complete against the common council, not against the commissioners; that the case was not brought within the provision of the act of 1872 (chap. 161, Laws of 1872), providing for the prosecution of municipal officers at the suit of a resident tax-payer to prevent waste, etc., as there was no claim that the commissioners were liable to waste the fund, and as that act was intended to provide for cases where the remedy was doubtful, not to a case where the statute directly points out a mode of relief.

*Lutes v. Briggs* (5 Hun, 67) reversed.

(Argued February 15, 1876; decided March 21, 1876.)

APPEAL from judgment of the General Term of the Supreme Court, affirming a judgment in favor of plaintiffs entered upon the report of a referee. (Reported below, 5 Hun, 67.)

This action was brought to have certain proceedings of the commissioners of public works of the city of Rochester, in relation to the construction of a sewer, declared void, and to restrain the collection of an assessment therefor, as well as the payment of any moneys already collected.

On the 19th of January, 1874, after hearing the allegations of all parties, an ordinance was adopted by said commissioners, ordaining, among other things, "the deepening and enlarging of Platt street sewer from the east high bank in the rear of Jefferson mills building to the west line of State street, by enlarging that portion under said mill, constructing a tunnel under the race and deepening that portion of the sewer in Mill street and Platt street to the west line of State street, said sewer to be not less than seven feet square and arch cover, except that portion which is tunneled, and to be at least twenty-five feet deep at State street; also, to construct the necessary surface sewers, man-holes and connections for side sewers; and the whole expense shall be defrayed by an assessment upon the lots and parcels of land to be benefited thereby," and an assessment was accordingly ordered to be made for the sum of \$23,000, the estimated expense, and the same was afterward made and confirmed. The commissioners duly adver-

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tised for proposals for the construction of the work, and among others John D. Spalding made a proposal in an alternative form, one alternative being "for sewer through Mill and Platt streets, per lineal foot, twenty dollars," and the other alternative being "for tunnel under Mill and Platt streets, per lineal foot, twenty-five dollars." On the 10th of April, 1874, the commissioners, by resolution, awarded the contract to Spalding "for \$18,680 for an open cut and tunnel sewer." On the 24th of April, 1874, some of the parties interested petitioned the commissioners "to contract for a tunnel and not for an open cut," and on the same day the commissioners passed a resolution that the vote awarding the contract for building an open sewer be reconsidered, and postponed further action. On May 1, 1874, the commissioners, without further advertisement or ordinance, awarded the contract to Spalding under the alternative in his proposal for a tunnel under Mill and Platt streets, and a formal contract was executed. Under this, Spalding went on with the work, and has received some portion of the assessment that has been collected. The change increased the expense about \$4,000. The plaintiffs are some of the owners of real estate assessed, and they bring this action in behalf of themselves and all others similarly interested.

The referee, to whom the case was referred, ordered judgment for plaintiffs for a perpetual injunction, restraining the appropriation or payment of any money out of the fund raised by the assessment for any work done under that portion of the contract providing for the construction of a tunnel under Mill and Platt streets. Further facts appear in the opinion.

*J. B. Perkins* for the appellants. Plaintiffs have no right to maintain this action. (*Doolittle v. Supervisors*, 18 N. Y., 155, 162; *Roosevelt v. Draper*, 23 id., 318; *Bank v. Suprs.*, 25 id., 315; *West. R. R. Co. v. Nolan*, 48 id., 513, 519; *Kilbourne v. St. John*, 59 id., 21.) The action and injunction could not be sustained in equity. (*Bord v. Kenosha*, 17 Wis., 284; *Merrill v. Humphrey*, 24 Mich., 170; *Morrison v. Hershire*, 32 Ia., 271; *Mills v. Johnson*, 17 Wis., 595; *R. R.*

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*Co. v. Morris*, 7 Kan., 215; High on Injunc., §§ 363, 364, p. 203.)

*J. C. Cochrane* for the respondents. This action was properly brought by plaintiffs. (*Sharp v. Spier*, 4 Hill, 76; *Greaton v. Griffin*, 4 Abb. [N. S.], 310; *In re Ford*, 6 Lans., 92; *In re Mayor, etc.*, N. Y., 11 J. R., 77; *Doolittle v. Suprs.*, 18 N. Y., 167; *People v. Canal Board*, 55 id., 390; *Ayres v. Lawrence*, 59 id., 192.) The defendants were all necessary parties. (*Fitzpatrick v. Flagg*, 5 Abb., 213; *People v. Miner*, 2 Lans., 411; *Allis v. Wheeler*, 10 Alb. L. J., 233, note 15.) The second letting was void. (*Sharp v. Spier*, 4 Hill, 76; *In re Ford*, 6 Lans., 94; *People v. Bd. Improvement*, 43 N. Y., 227; *Ireland v. City of Rochester*, 51 Barb., 414; *McCullough v. Mayor, etc.*, 23 Wend., 458; *In re McCormick*, 60 Barb., 128.)

MILLER, J. No question is made by the plaintiffs as to the validity of the ordinance and proceedings of the board of public works of the city of Rochester up to the time when the contract was awarded on the 10th day of April, 1874. In fact, the prayer for relief, in the complaint, only asks that the proceedings since then be declared illegal and void; or, if declared valid in part, then that no more of the assessments shall be collected than is necessary to complete the work on the sewer according to the terms and conditions of the original ordinance, and that the assessments of the plaintiffs and others be reduced accordingly. The report of the referee only found that the final letting of the contract was contrary to the ordinance and illegal and void; and the judgment only restrained the appropriation of money out of the funds raised by the assessment for work done under that portion of the contract which provided for the construction of a tunnel under Mill and Platt streets.

The objections taken to the proceedings are without foundation, and no illegality is shown in the action of the commissioners which renders them invalid. The referee's conclusion

that the contract was unauthorized is based entirely upon an erroneous construction of the terms of the ordinance under which the proceedings were instituted. He found that it did not provide for a tunnel under Platt and Mill streets, but that the sewer in question must be deepened in some other manner than by a tunnel. The improvement demanded was a sewer, and the ordinance provided that the following improvement be expedient, viz.: "The deepening and enlarging of Platt street outlet sewer, from the east high bank in the rear of Jefferson mills, leading to the west line of State street, by enlarging that portion under said mill, constructing a tunnel under the race, and deepening that portion of the sewer in Mill street and Platt street to the west line of State street."

It did not specify the mode in which this portion of the work should be constructed, and the general purpose of the ordinance being for a sewer, there was ample authority in the board to make a contract for it, either by an open cut or by tunneling, as might be deemed for the interests of the lot-holders or the public. The "deepening" of a sewer would of itself include any mode by which this process could be accomplished. The ordinance only provided that one part of the work should be tunneled, and as to the remainder, it was to be deepened, in the exercise of a judicious discretion of the board. The use of particular words cannot be regarded as restricting their meaning to those alone, so long as others are employed which are susceptible of a more enlarged or a different interpretation. It is enough that there was no more difficulty in deepening a sewer in one mode than by another to hold that the power to tunnel existed, and was properly exercised. Although the first adopted contract provided for an open-cut sewer, the commissioners were justified, in the exercise of a sound discretion, to make the change to a tunnel, within the strict meaning of the ordinance, upon the remonstrance of the tax-payers showing that a cutting down from the surface would seriously affect an important business street. The objections to making such a change, and thus increasing the expense, as was apparent



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from the bids which had been made for a tunnel, were questions for the consideration of the commissioners; but as the right to tunnel was clearly within the ordinance, their determination cannot be reversed upon the ground that it was not provided for. It is not apparent in the proceedings that the commissioners in any way violated the provision of the seventh section of chapter 771, Session Laws of 1872, which confers upon the owners the right to designate the kind of improvement they prefer, and directs that the commissioners shall adopt and carry out said method of improvement. The petition presented did not designate any particular mode, or indicate any direct preference for one mode over another. The position that the tax-payers expressed such preference at the time the ordinance was drawn is not well founded, as we have seen that the ordinance will not bear a construction that a tunnel was not in part contemplated for the entire work, and was not clearly within the fair import and meaning of the ordinance, if it was deemed the best mode of carrying out the improvement. In fact, the advertisement and bidding-sheet being in the alternative, indicates that the commissioners intended to exercise the right to adopt either of the modes which they considered advisable.

Neither did the commissioners exceed their authority in entering into the written contract finally adopted. Nor were they required to advertise again for the letting, as they had already complied with the provisions of the charter of the city (S. L. 1872, chap. 771, § 8) by the notice which had been published as the law required. The provision in that section, to the effect that upon the day named or upon such other day as the commissioners may adjourn to, they may let the contract, and neither the principal nor sureties upon any proposal or bond shall be permitted to withdraw or cancel the same, or be released therefrom, until the commissioners shall have let the contract, and the same shall have been duly executed, evidently was intended to prevent a discharge of the sureties, and has no relation to the letting of the contract beyond this. The bidding was in the alternative, and contemplated either

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of the modes thereby indicated. The commissioners were lawfully authorized to adopt the proposal for tunneling before the contract was entered into in writing, and the change made was in entire conformity with the bid which was accepted. The power of the board was not exhausted by the original award. There was no legal obstacle to an arrangement which was contemplated by the proposal and the bids, and no harm done to any person liable to be assessed, which is a lawful ground of complaint. It may also be observed that the proceedings do not show affirmatively that no adjournment was had, as they should do where reliance is placed upon any such alleged defect. Nor is there any such excess of work provided for by the contract as would authorize an adjudication that the proceedings were void for want of jurisdiction.

The considerations already presented dispose of the case, but independent of them it is not obvious upon what ground the action can be maintained by the plaintiffs. It is not sought to invalidate the assessment which is conceded to be legal, but the judgment simply restrains the payment of moneys collected, while the plaintiffs, as is conceded, have but a comparatively trifling interest, if any, in the fund in question. According to the charter (§ 207, Laws of 1861, chap. 103), if, upon the completion of the improvement, it appears that a greater amount was assessed and collected than was required, such amount must be apportioned by the common council and paid to the owners of the property on demand. The remedy of the plaintiffs was, therefore, complete against the common council if any surplus remained, and is not against the commissioners. It is no answer to say that the remedy might be doubtful if the money had been expended and paid out for any illegal expenditure, if it would not be a defence in an action brought to compel the apportionment of such surplus.

Nor is the case brought within the provisions of chapter 161 of the Laws of 1872. There is no claim that the commissioners are likely to waste the fund in question, and that act

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was intended to provide for cases where the remedy was doubtful as to what person or party could maintain an action, and not to a case where the statute directly pointed out the mode of relief.

As the judgment stands in this action, the whole amount of the assessment must be collected, but none of it appropriated, for the payment of the portion of the contract providing for the construction of a tunnel under Mill and Platt streets. No legal disposition is made of the money, and some other action or proceeding will be required to distribute it. In the mean time the work must be suspended unless already completed, and if the latter, the plaintiffs reap the benefit of the improvement without contributing toward the same. It is not apparent how such a judgment can be upheld.

Judgment reversed and a new trial granted, with costs to abide the event.

All concur; CHURCH, Ch. J., not sitting.

Judgment reversed.

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WILLIAM J. DOUNCE, Respondent, v. BENJAMIN F. DOW et al.,  
Appellants.

Defendants ordered of plaintiff, a dealer in, but not a manufacturer of, iron, ten tons of "XX pipe iron," to be used in the manufacture of castings for farming implements which required soft, tough iron. Plaintiff forwarded iron of the brand specified and billed it as such, which was accepted by defendant, without testing, and a large portion used, when it was discovered to be hard and brittle and unfit for the required purpose. In an action upon a note given for the purchase-money, wherein defendant set up as a counter-claim the damages sustained by the use of the iron, *held*, that there was a warranty of the character of the iron as "XX pipe iron," but not as to any certain quality of that brand, as plaintiff could not be presumed to know the precise quality of every lot bought and sold by him, and that plaintiff, in the absence of fraud, was only bound to deliver iron of the specified brand; that it was not enough that plaintiff knew the purpose for which it was required to bind him to deliver the quality required, defendant

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should have ~~executed~~<sup>waived</sup> a specific warranty which would have survived the acceptance.

Also, *held*, that if a warranty that the iron was merchantable could be implied, defendant, by using a large portion of the iron after an opportunity to examine and ascertain the quality, must be deemed to have accepted it and to have waived the warranty.

*Day v. Pool* (52 N. Y., 416) distinguished.

Where a party requests certain specified questions to be submitted to the jury for which there is no valid ground, it will be assumed that he intends to waive the submission of other questions, and a refusal to submit the case to the jury is proper.

(Argued February 18, 1876; decided March 21, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department in favor of plaintiff, entered upon an order denying motion for a new trial and directing judgment upon a verdict. (Reported below, 6 T. & C., 653.)

This action was upon a promissory note made by defendants, to the order of the plaintiff, payable at four months at the Genesee Valley National Bank.

The defence was that the note was given for ten tons of "XX pipe iron," which defendants bought of plaintiff, to be used in making castings for agricultural implements, in the manufacture of which defendants were engaged at Fowlerville, in this State. The iron was shipped to, and received by the defendants, and, without making any test or examination of it, it was mixed with other varieties of pig-iron and converted into such castings. The iron so purchased of plaintiff was so rotten and worthless that the castings made from it were valueless, and the defendants were put to great expense in the effort to use said iron, and to great loss in utter worthlessness of the machinery made therefrom. This loss and expense they set up as a counter-claim to the note.

It appeared upon the trial that the plaintiff was a dealer in pig metals, at Elmira, and the defendants were, and had for a number of years been, manufacturers of castings for agricultural implements at Fowlerville. Prior to the 27th of

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January, 1869, several letters had passed between the parties as to pig-iron of various sorts, in one of which letters defendants ask plaintiff the price for "XX pipe iron." On the twenty-eighth of January plaintiff wrote to defendants a letter, in which he acknowledged the receipt of a letter from them, and told them he could supply them XX pipe through the season, but would not fix any certain price for the same. He said he could sell XX pipe then at forty-two dollars and fifty cents, and would sell all the season that brand at the lowest figure he could. He also gave the time and manner in which he required payment. On the twenty-ninth of January defendants wrote to the plaintiff to enter their order for ten tons of XX pipe iron, and send to them at Caledonia as soon as received. On the 12th of February, 1869, plaintiff shipped to defendants, as directed, ten tons branded and billed as XX pipe, addressed to them at Fowlerville. On or about the fifteenth of February, and before the iron was received, defendants sent to plaintiff their note for the amount of the bill. It did not conform entirely to the terms of sale, and plaintiff returned it to defendants, who corrected the error and returned the same to plaintiff. A few days thereafter the iron was received by defendants. When they came to use the castings made, they were found to be brittle and worthless, and, on examination, the XX pipe iron was found to be brittle, rotten and worthless.

Five tons of the XX iron were used before its worthlessness was discovered, and then defendants wrote to plaintiff complaining of the injury done to them by reason of the bad quality of the iron sold to them, refusing to use any more of it and offering to return what remained unused. The iron in question was manufactured at a furnace in Pennsylvania, and purchased by plaintiff to be sold by him. He had none on hand when he received defendants' order, but ordered it from the manufactory, received and shipped it as "XX pipe iron." The quality of pig iron cannot be ascertained by merely examining it externally. There are two tests by which to determine the quality. One is melting it;

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the other, breaking the pig so that the internal surface may be examined, and from the appearance of that surface a person acquainted with pig-iron could determine its quality quite accurately without using it. The iron sent to defendants was not broken and examined, and the effect of it upon the castings was not ascertained for several weeks, as defendants cast a large quantity before they prepared them for use.

There was some conflict in the evidence as to whether the iron was, in fact, "XX pipe."

Counsel for the defendants asked permission to go to the jury upon the questions of the market value of the iron in question; as to whether the iron was worth any thing for the purposes of the defendants' business, and as to whether there was not a warranty on the part of the plaintiff, express or implied, that the iron shipped upon the order of defendants was fit and suitable for use in the manufacturing business of the defendants. The court declined to grant the requests; to which ruling and decision counsel for the defendants duly excepted.

The court directed a verdict for plaintiff for the amount of the note. Exceptions were ordered to be heard at first instance at General Term.

*J. B. Adams* for the appellants. Plaintiff was liable the same as if he were a manufacturer of the iron to a warranty, not only that it was XX pipe iron, but that it was suitable for manufacturing defendants' castings. (*Beals v. Olmstead*, 24 Vt., 114; Story on Con. [2d ed.], § 836; Sedg. on Dam. [4th ed.], 333, note; 2 Kent's Com. [10th ed.], 660; *Hawkins v. Pemberton*, 51 N. Y., 198; *Hoe v. Sanborn*, 21 id., 552; *Gurney v. A. and G. W. R. Co.*, 58 id., 358; *Jones v. Bright*, 5 Bing., 533; *Brown v. Edgington*, 5 M. & G., 371; *Muller v. Eno*, 14 N. Y., 597; *Day v. Pool*, 52 id., 416; *Bradford v. Marley*, 13 Mass., 144.) Evidence of defendants' damages by reason of the breach of plaintiff's warranty was competent. (*Parks v. Morris Ax and Tool Co.*, 54 N. Y., 586; *Passinger v. Thorburn*, 34 id., 634.) Defend-

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ants are not chargeable with contributory negligence in using the iron without testing it. (*Bk. of Kingston v. Eltinge*, 40 N. Y., 391; *Dounce v. Dow*, 57 id., 16.)

*J. R. Ward* for the respondent. The contract was executory, and it was defendants' duty to test and examine the iron as soon as received. (*Hargous v. Stone*, 5 N. Y., 86; *Beck v. Sheldon*, 48 id., 365; *Dutchess Co. v. Harding*, 49 id., 323; *Reed v. Randall*, 29 id., 362; *Gaylord Mfg. Co. v. Allen*, 53 id., 515; *Gurney v. A. and G. W. R. Co.*, 58 id., 364.) No warranty can be implied from the fact that plaintiff knew defendants' business and that they wanted the iron to use in it. (*Bartlett v. Hopkins*, 34 N. Y., 118, 122, 125; *Beck v. Sheldon*, 48 id., 365; 5 id., 86; 29 id., 362; *Hoe v. Sanborn*, 21 id., 557.) Defendants were not entitled to be compensated for the damages of which they complain. (*Passinger v. Thorburn*, 34 N. Y., 634; *Milton v. H. R. Stbt. Co.*, 37 id., 210.)

CHURCH, Ch. J. The article ordered was "XX pipe iron," and the same was forwarded and billed as such. This was a warranty of the character of the article within the decision in *Hawkins v. Pemberton* (51 N. Y., 198), which modified, to some extent, the earlier decisions of *Seixas v. Woods* (2 Caines, 48) and *Swett v. Colgate* (20 J. R., 196). The words "pipe iron" referred to the furnace where manufactured, and "XX" to the brand indicating the quality. The plaintiff was not a manufacturer, but a dealer in "pig metals," and was not presumed to know the precise quality of every lot of pigs bought and sold by him, bearing that brand, and hence cannot be held to have warranted that the pigs in question were of any certain quality. (*Hoe v. Sanborn*, 21 N. Y., 552.) There was no fraud. Both parties supposed, doubtless, that the iron was first quality for the purpose for which it was intended. But it is not enough that the plaintiff knew such purpose. (34 N. Y., 118.) The defendant should have exacted a specific warranty, and then both parties would have acted under-

standingly. If the defendants had ordered XX pipe iron, which was tough and soft, and fit for manufacturing agricultural implements, and the plaintiff had agreed to deliver iron of that quality, a warranty would have been established which, probably, within the case of *Day v. Pool* (52 N. Y., 416), would have survived the acceptance of the article. Here both parties acted in good faith. The defendants ordered simply XX pipe iron, supposing that such iron was always tough and soft. The plaintiff forwarded the iron under the same impression. The iron proved to be brittle and hard, and the question is, which party is to bear the loss? The plaintiff (in the absence of fraud) was only bound by his contract, which was to deliver XX pipe iron, and we are now assuming that such iron was delivered. If so, he was relieved from liability. The only other liability which can be claimed that he incurred was of an implied warranty that the iron was merchantable, and this could not be affirmed unless the contract was executory. (2 Kent's Com. [11th ed.], note c, p. 634.) Without inquiring whether such a warranty would be implied under the circumstances of this case, or if it would, what in this case the term "merchantable" would import, it is sufficient to say that the defendants, by using a large portion of the iron after an opportunity to examine and ascertain whether it was merchantable, must be deemed to have accepted it, and to have waived the alleged implied warranty within the general rule which, to this extent, is not impaired by *Day v. Pool* (*supra*).

The only serious question in the case is, whether the court erred in directing a verdict. There was, as we have seen, an express warranty that the iron was XX pipe iron, and there was some evidence, although slight, that it was not. It is claimed that this point was waived. The counsel for the defendants asked to go to the jury upon several questions, but did not include among them the question whether this warranty was broken. It must, I think, be assumed that when a party requests that certain specified questions be submitted to the jury, for which there is no valid ground, that he



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intends to waive the submission of other questions. (43 N. Y., 85, and cases cited.)

Regarding this point as waived, the requests made to submit to the jury were properly declined.

The ruling in rejecting the letter of the 28th March, 1868, to the defendants' predecessors, with this point out of the case, was not erroneous. That letter was not a warranty that the iron in question was tough and soft, but might have been admissible as a declaration of the party, if the iron had not been XX pipe iron. The same brand of iron is not always of the same quality, and the statement, the year before, by the plaintiff that he was receiving iron of that brand, which was tough and soft, would not inure as a warranty that all the iron which he might thereafter sell of that brand was of that quality.

We think that the judgment must be affirmed.

All concur; ANDREWS, J., concurring in result.

Judgment affirmed.

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ELIZABETH F. CAGGER, as Mother and Guardian, et al.,  
Respondents, v. MARTINUS LANSING, Appellant.

In an action of ejectment, plaintiffs gave in evidence a judgment roll in a former action of ejectment brought by the grantor of plaintiffs' ancestor against defendant to recover the same lands wherein it was adjudged that said grantor was entitled to possession — *held*, that said roll was conclusive proof of the right of possession in said grantor; that the statutory right of redemption for six months after execution of writ of possession (2 R. S., 506, §§ 33, 34), did not vary its effect as evidence in subsequent suits between the parties, or their privies, of what was adjudicated; and in the absence of proof, that the right so adjudicated did not still exist, plaintiffs, on proof that they had succeeded to that right, were entitled to a judgment for the recovery of possession.

The complaint in the former action claimed a title in fee, alleging a grant in fee of the lands in question to defendant's grantor, with a charge

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upon them of a yearly rent in perpetuity to the grantor in said grant, his heirs and assigns, with clauses, that, in case of non-payment, the grantor might re-enter, have, repossess and enjoy the former estate and expel the grantee, and that the indenture should become void; it alleged non-payment, and notice to defendant of the intention of plaintiff to re-enter, in pursuance of the act of 1846 (chap. 274, Laws of 1846). The answer of defendant took issue upon these averments, and the referee found in favor of plaintiffs. The referee did not find specifically what title plaintiffs had in the premises, and in the judgment entered upon the report no mention was made of plaintiff's title, but simply an adjudication that plaintiff recover and have possession. Upon the evidence furnished by the judgment roll the court, in the second action, directed the jury to find a title in fee in the plaintiffs. *Held*, no error, that the interest in the rent, owned by the grantor, was an estate therein in fee simple; that, by the right of re-entry and avoidance of the lease or grant upon non-performance of the condition to pay rent, a conditional estate was constituted in the grantor, and a right to enforce it by action of ejectment; and that upon breach of the condition, the whole estate was at law cast upon the grantor, and he became revested with an estate in fee simple in the lands; also, that it was immaterial that the referee did not in terms express a conclusion of law to that effect, as it results necessarily from the facts found, and the judgment was conclusive as to plaintiffs' title.

*Havingill v. Hare* (Cro. J., 516), *Jemot v. Cooley* (Sir T. Raym., 135, 158) distinguished.

The action of ejectment now tests not only the right to the possession but the title under which the right exists, whether in fee, for life, or for years. Some of the plaintiffs were infants; their father died intestate. *Held*, that their rights were enforceable by their mother as guardian in socage. Also, *held*, that plaintiffs being the holders of the legal title, were the proper parties to enforce it; and that the fact that they held it as security for a debt, the equitable title being in another, could not be interposed to defeat a recovery.

One count of the complaint set forth the value of the use and occupation and claimed the same as damages. Upon the trial, evidence was given, without objection and uncontradicted, as to the value of the use and occupation. The court directed the jury to find the amount so proved for plaintiffs, "for withholding the possession of the premises." This was excepted to generally. It was urged upon appeal that testimony of the value of the use and occupation was not competent upon an issue as to the damages for withholding possession. *Held*, that the allegation in the complaint was a sufficient claim for *mesne* profits; and that no exception was taken below sufficient to present the objection.

*Larned v. Hudson* (57 N. Y., 151) distinguished.

In the judgment the sum recovered was stated to be as damages for with-

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holding possession. *Held*, that this was not an error reviewable upon exception, but an irregularity to be corrected on motion.

(Argued February 21, 1876; decided March 21, 1876.)

APPEAL from judgment of the General Term affirming a judgment in favor of plaintiffs entered upon a verdict.

This was an action of ejectment to recover possession of certain lands in Rensselaer county. The answer was the general issue. Plaintiff put in evidence a judgment roll in an action in the Supreme Court to recover possession of the same premises wherein William P. Van Rensselaer was a plaintiff, and the defendant herein defendant, the complaint in which alleged in substance that Stephen Van Rensselaer (plaintiff's testator), then the owner of the premises, and Peter W. Witbeck, in 1789, made and executed a certain indenture whereby said Van Rensselaer granted and sold to Witbeck the premises in question, to have and to hold to himself, his heirs and assigns forever, he paying therefor yearly certain specified rents; and in which it was provided that in case the rent reserved, or any part thereof, should remain unpaid for twenty-eight days after the time of payment, it should be lawful for said Van Rensselaer, his heirs and assigns, at his or their option, to prosecute for the payment thereof, to distrain, and also, in case of non-performance upon the part of Witbeck, his heirs or assigns, of any of the covenants and conditions it should be lawful for said Van Rensselaer, his heirs, etc., to re-enter into the granted premises, "and the same as his and their former estate, to have again, repossess and enjoy; and the said party of the second part (Witbeck), his heirs and assigns, and all others thereout and from thence utterly to expel, put out and remove," and that from and after such entry the indenture should become void and of no effect. The complaint then alleged non-payment of rent; service of notice of intent to re-enter under the act of 1846. (Chap. 274.) The answer was a general denial. The referee, to whom the action was referred, found the facts substantially as alleged in the complaint, and as conclusions

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of law that plaintiff was "entitled to recover and have possession of the premises." Judgment was perfected on said report, February 16, 1864, adjudging that plaintiff recover possession of the premises.

Plaintiffs also gave in evidence a deed dated August 12, 1864, from William P. Van Rensselaer and wife to James Kidd and Peter Cagger, granting and conveying to them "all the estate, interest, property, right, title, claim and demand now vested in or belonging to" said Van Rensselaer, individually, and as executor of his father, Stephen Van Rensselaer, deceased, in all the "lots of land or farms situate, lying and being in the county of Rensselaer, and Manor or Rensselaerwyck, which are described in and were demised, granted or leased in perpetuity in and by the several indentures commonly known as leases or grants in fee, reserving rents," etc.; and also all the estate, title and interest of the grantor in the several indentures, and the rents, conditions and remedies reserved, created and provided for; and also all the rents in arrear, and all judgments obtained by said William P. Van Rensselaer, and in case by re-entry or otherwise, the rights of the parties under said indentures had become changed or modified so that the title in fee simple, or otherwise, to the lands demised, had become vested in said grantor, all the rights, estate and interests, etc., so acquired were granted, conveyed and assigned. In the schedule annexed and referred to, was included the grant to Witbeck of the land in question. Plaintiff also gave in evidence a deed or indenture from James Kidd and wife to Peter Cagger, conveying and assigning all the rights, title and interest acquired by Kidd under said grant from Van Rensselaer. Cagger died in 1868, leaving the plaintiffs, his children, of whom four were minors, who appear by their mother as guardian.

At the close of plaintiffs' evidence, defendant's counsel moved for a nonsuit upon the grounds, among others, that Mrs. Cagger, as mother and guardian, could not maintain the action. That Peter Cagger did not die seized of the premises. That the interest of William P. Van Rensselaer was not con-

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veyed to Cagger. That Van Rensselaer was not seized of an estate in fee in the premises, but that the same remained and continued in Witbeck, his heirs and assigns. That if the deeds from Van Rensselaer to Kidd and Cagger, and from Kidd to Cagger, were intended to embrace an estate in fee in the lands they were void by statute, because defendant was then in possession, claiming to own in fee and adverse to the grantors. The motion was denied and said counsel duly excepted. Defendant gave evidence tending to show that the equitable title to the lands and property covered by the deeds, was in Walter S. Church, the title having been taken in the name of Kidd and Cagger to secure advances made by them to Church to pay to Van Rensselaer the purchase-price of the property and for other purposes. The court directed the jury to find a verdict in favor of the plaintiffs; that they were entitled to an estate in fee in the lands in question, and to recover possession, with \$850 (the amount proved as the value of the use and occupation), for withholding the same, to which defendant's counsel duly excepted.

A verdict was rendered accordingly. In and by the judgment it was adjudged that plaintiffs recover possession of the premises. Nothing was stated therein as to plaintiffs' title.

Further facts appear in the opinion

*A. J. Colvin* for the appellant. The deed from Van Rensselaer to Witbeck, in 1789, was a sale and alienation of the grantor's estate in fee in the land. (*De Peyster v. Michael*, 6 N. Y., 467; *Van Rensselaer v. Hays*, 19 id., 71-76; *Van Rensselaer v. Read*, 26 id., 558; *Van Rensselaer v. Dennison*, 35 id., 393; *Sackett v. Barnum*, 22 Wend., 605; *Hope v. Booth*, 20 Eng. C. L., 574; *Van Heusen v. Radcliff*, 17 N. Y., 582; *Van Rensselaer v. Snyder*, 13 id., 299; *Jemott v. Cooley*, T. Raym., 135, 158; *Van Rensselaer v. Slingerland*, 26 N. Y., 587; *Van Rensselaer v. Ball*, 19 id., 104-107; *Giles v. Austin*, N. Y. Weekly Digest, 153; 2 Story's Eq. Jur., §§ 1314, 1315.) A judgment record in another action is conclusive only of such facts as were legitimately within

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the issues to be tried as a part of the merits of the case, and either expressly or by necessary implication thereby determined. (*Woodgate v. Fleet*, 44 N. Y., 1; *People v. Johnson*, 38 id., 63; *Jackson v. Wood*, 3 Wend., 27; *Fairman v. Bacon*, 8 Conn., 418; *Gray v. Pingry*, 16 Vt., 419.) The court erred in holding that the copies of the execution and return produced in evidence were conclusive and in refusing to hear evidence denying their truth. (*Baldwin v. Ryan*, 3 Pars., 253; *Fellows v. Van Hyring*, 23 How. Pr., 230; *Brissell v. Pearce*, 28 N. Y., 252; 1 R. S., 377, § 65; id., 350, § 16; *Brown v. Hanford*, 7 Hill, 120; 5 Den., 586; *Gifford v. Woodgate*, 11 East., 297; *Case v. Redfield*, 7 Wend., 398; *Boomer v. Laine*, 16 id., 525; *Wheeler v. Lampman*, 14 J. R., 481; *Thayer v. Stearns*, 1 Pick., 109; *Saxton v. Nimes*, 14 Mass., 315; 18 Wall., 457; 19 id., 58; *Van Rensselaer v. Chadwick*, 7 How. Pr., 297; 2 R. S., 240, § 77; *Baker v. Binninger*, 14 N. Y., 270; *Barnes v. Harris*, 4 id., 386; *Russel v. Gay*, 11 Barb., 544; *Sheldon v. Payne*, 7 N. Y., 453; *People v. Ames*, 35 id., 482; *Armstrong v. Sheriff, etc.*, 6 Cow., 465; *Townsend v. Olin*, 5 Wend., 209.) A judgment in ejectment is a recovery of possession, not of the seizin or freehold. (*Atkins v. Horde*, 1 Burr., 114; 2 R. S., 304, § 36; *Roseboom v. Van Vechten*, 5 Den., 419; *McGregor v. Comstock*, 17 N. Y., 166; *Chamberlin v. Choles*, 35 id., 479; *Doe v. Lord*, 7 A. & E., 610.) The final judgment on the \$1,000 parol contract estopped the parties from asserting the contract thereafter. (*Clute v. Jones*, 28 N. Y., 284; *Eben v. Lorrillard*, 19 id., 299.) Peter Cagger had no right except as a mortgagee, and plaintiffs took no rights therein at his death. (*Murray v. Walker*, 31 N. Y., 399; *Stoddard v. Whiting*, 46 id., 630; *Carr v. Carr*, 52 id., 251; *Church v. Kidd*, 5 N. Y. Sup. Ct., 461; 1 Washb. on R. P., 479; 2 R. S., 82, 83, § 6, subd. 8; *Wilson v. Troup*, 2 Cow., 195; *Merritt v. Bartholic*, 36 N. Y., 44.) A mortgagee cannot maintain ejectment. (2 R. S., 312, § 57; 31 N. Y., 399; 52 id., 251; *Jackson v. Myers*, 11 Wend., 537; *Manning v. Moscow Pres. Ch.*, 27 Barb., 54.) A deed absolute on its

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face cannot be proved a trust deed by parol testimony, but it may by such proof be shown to be a mortgage. (2 R. S., 134, § 6; *Hodge v. Ten. Ins. Co.*, 8 N. Y., 419; *Sturtevant v. Sturtevant*, 20 id., 40; *Horn v. Kettletas*, 46 id., 610; *Stoddard v. Whiting*, id., 632; *Carr v. Carr*, 52 id., 258.) There is no relation analogous to that of trustee and *cestui que trust* between a mortgagee and mortgagor. (*Ten Eyck v. Craig*, N. Y. W. Dig., 259; 4 Kent, 160; 1 Wash. on R. P., 479, 480; *Clark v. Henry*, 2 Cow., 327; *Murray v. Walker*, 31 N. Y., 403.)

*Samuel Hand* for the respondents. The question of title and right to possession was conclusively settled against defendant by the judgment of 1864. (2 R. S., 309, § 36; *Beebe v. Elliott*, 4 Barb., 457; *Bennett v. Couchman*, 48 id., 73.) The deeds to Kidd and Cagger, and release of Kidd to Cagger were not void. The tenant's possession, under a lease in fee, was not adverse. (*Bedell v. Shaw*, 59 N. Y., 46; 1 R. S., 739, § 146; 2 R. S., 691, §§ 5-7; *Tyler v. Heidorn*, 46 Barb., 439; *Keneda v. Gardner*, 4 Hill, 469; *Jackson v. Stemburgh*, 1 J. Cas., 153; *Jackson v. Graham*, 3 Cai., 188; *Stevens v. Hausen*, 39 N. Y., 302.) There was nothing in the objection to plaintiffs' title arising out of Church's contract. (*Van Rensselaer v. Dennison*, 35 N. Y., 393; *Van Rensselaer v. Barringer*, 39 id., 1.) The admission of the return to the execution in May, 1864, was proper, or if not, could do no harm. (*Russell v. Gray*, 11 Barb., 541; *Henderson v. Claims*, 14 id., 15.) The arrangement in 1865, between Cagger and Lansing, including the deed and receipt, and the \$4,000 paid, were properly held not to affect plaintiff's rights. (*Cagger v. Lansing*, 43 N. Y., 550, 553.)

FOLGER, J. The judgment recovered by the plaintiffs was, as entered, for the recovery of the possession of the lands and premises described in the complaint, for damages for the withholding of the same, and for costs.

The defendant appeals therefrom, and to succeed in his appeal, he must show that the judgment is not warranted

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by the facts appearing on the trial, or that there was some error in bringing them before the jury, or in the direction to the jury upon them.

So far as the judgment is for a recovery of the possession of the premises, it is sustained by the facts. The judgment roll in the former action, put in evidence on the trial of this action, showed an adjudication against the defendant, that the plaintiff therein was entitled to recover against the defendant the possession of the premises, and that possession thereof was awarded and adjudged to him. By that judgment the defendant is bound, and may not deny it. There was no objection made to the reading of the roll in evidence. It is now contended that the judgment cannot be evidence of title in the plaintiffs' grantor; and much is said to show that a judgment is not a mode now recognized by law for the conveyance of land. The appellant misapprehends the purpose and effect of introducing the judgment roll in evidence. It was not by it to create a title, but by it to prove that in a former action, to which the appellant was a party, a title out of him, and in the grantor of the plaintiff's ancestor, had been established. The judgment record did not create the fact. It was proof of the fact otherwise created; "where the issue is upon the fact, the record may be given in evidence to support that fact." (1 Gilbert on Ev., p. \*28; Powell's Law of Ev., p. \*244, 245; *Pearce v. Gray*, 2 Younge & Coll., 522.) In the former trial, the title to the land having been at issue, if the judgment roll showed that there had been litigation, examination and determination of that issue, the defendant was bound by that determination, not as making title, but as showing, that proof had been made of title, and an adjudication of the sufficiency thereof. It now acts as an estoppel upon the defendant, to deny that there was sufficient evidence in that action on which to base that adjudication. No point was made that the remedy was by writ of possession under that judgment, instead of by this action, to enforce the right of possession adjudged by it. Nor is the reliance of the defendant upon the statutory right of redemption for six



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months after execution of writ of possession, available against the effect of the judgment roll as evidence. (2 R. S., p. 506, §§ 33, 34.) Whatever the relative rights of the parties to the action after judgment, by force of any statute, the judgment roll is yet evidence of what was adjudicated, and so far a basis of judicial action in subsequent suits between the same parties or their privies. If it shows a title in fee adjudicated, it gives reason for a verdict of recovery of possession under such title. No attempt was made, save by testimony hereafter to be considered, to show that the right of possession did not still exist. If, then, the plaintiffs had succeeded to that right, they are entitled to the judgment which they have now obtained, viz., that they do recover possession of the lands and premises. They succeeded to the right therein of Peter Cagger, their ancestor. By the instruments of transfer from Kidd to him, and from William P. Van Rensselaer to Kidd and him, he obtained all the right which Van Rensselaer had by virtue of the judgment. The criticism made upon the terms of those instruments, by the appellant in his statement of facts, and in his second point, is not tenable. Those instruments transfer all the estate, etc., of the assignors, in the lands described in the indenture to Whitbeck; all the estate, etc., which was reserved to Stephen Van Rensselaer, in that indenture; all the estate in the indenture and the rents reserved or granted by it; all right to any rent or money due thereby and in arrear; any judgment or security obtained or taken for rent; any rights or title by fee-simple vested in Van Rensselaer, by any re-entry since the 5th of March, 1858; and it is declared that the instrument is named by way of description, and all rights, estates, interests, claims, actions and demands, in and to the lots, lands, rents, tenements and hereditaments are granted, conveyed and assigned. It cannot successfully be claimed, that Cagger did not in his lifetime obtain and have, all the right which the plaintiff in that judgment had, against the defendant therein and herein, and in and to the lands and the possession thereof, named in the indenture. The death of Mr. Cagger intestate, devolved upon the plain-

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tiffs all the right which he had in his lifetime, subject to the right of dower of his widow, their mother. Among the rights of the plaintiffs thus acquired, was the right to possession adjudged in the former action. And these rights, so far as the minor plaintiffs are concerned, are enforceable in this action by their mother as guardian in socage. (*Holmes v. Seely*, 17 Wend., 75.)

These views dispose of the motion made by the defendant at the Circuit for a nonsuit, on the resting of the plaintiffs, so far as the points then taken are argued in this court. It did not matter on that motion, if the plaintiffs had a right of immediate possession, upon what estate or title in the lands it was based. The points made were not based upon the allegations in the pleadings (one of which was that the plaintiff had a title in fee); and a right to possession having been shown, there was not, for any reason advanced by the defendant, such a failure to make out a case as to warrant a nonsuit.

The plaintiffs had showed their title to whatever estate or interest in the premises Wm. P. Van Rensselaer once had by the conditions and covenants in the indenture, and by the judgment against the defendant. This certainly included a right to the possession of the lands under some title and for some purpose.

The next step in the trial brought to notice the contract between Kidd and Cagger and Walter S. Church. It is claimed that, by reason of this, Cagger had no interest greater than that of mortgagee. It is not necessary now to question but that Church, by that agreement, had an equitable right, enforceable against Kidd and Cagger, or Cagger alone. But the legal interest was in Kidd and Cagger at first, and then in Cagger, and now in the plaintiffs. These holders of the legal interest were from time to time, respectively, the persons capable of enforcing it against the defendant. They represented to him and to the world the legal right and title which Wm. P. Van Rensselaer had transferred. They could and can enforce that right. The enforcement will be for the benefit of Church, so far as his contract is

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valid, and gives him benefit. But the defendant cannot interpose an equitable interest of Church to defeat the legal right of the plaintiffs.

All the questions growing out of the introduction in evidence of the writ of possession, and the return to it, and the offer of evidence in contradiction of the return, are of no moment here; they were all immaterial. The right of the plaintiffs to recover was not affected either way by the evidence received, nor could it have been by that rejected. Their right depended upon the judgment in the former action, and upon the indenture and its conditions, and the action of their assignor availing himself of the benefit of those conditions, by way of re-entry and forfeiture.

The defendant asked that certain questions be submitted to the jury. We do not think that it was error to refuse. Under the evidence, there was no ground for maintaining that the rents had been paid. The receipts and satisfaction-piece had been signed by Cagger. The testimony of Church was uncontradicted, that there had never been a delivery of them, nor any right to a delivery. That they were in the hands of the defendant was not sufficient to make an issue of fact as against that testimony, fortified and sustained as it was by the former suit between Cagger and the defendant, which grew out of the same transaction. A verdict of a jury that the receipts and satisfaction-piece had been executed and delivered by Cagger to the defendant, as a consummation of a transaction between them, and that they showed payment of rents and satisfaction of judgment, would have been so contrary to the evidence as to have warranted the court in setting it aside for that reason. This is a test of the propriety of a refusal to submit a question to a jury.

There was no question of fact to be passed upon by the jury, for the determination of the question of law, whether the plaintiffs had any estate in the premises which descended to them from Cagger. That question depended alone upon the force of terms in written documents, and upon matter

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Opinion of the Court, per FOLGER, J.

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of record. It was a matter of interpretation and legal deduction.

The court directed the jury to find a verdict for the plaintiffs. There was not error in this. They were entitled, as we have seen, to a verdict for the possession of the premises.

The court directed the jury to find that the plaintiffs were entitled to an estate in fee in the lands. If the appellant is right in the position taken by him, that a recovery in ejectment is but a recovery of possession, and not of the seizin or freehold, without prejudice to the right, as it may afterward appear between the parties, then he is not injured by this direction of the court or by the verdict of the jury in obedience to it. The judgment entered upon the verdict is for the possession only. But we do not agree with the position of the defendant. As we understand the purpose of the Revisers and the statutes passed by the legislature, the action of ejectment now tests not only the right to possession, but the title under which the right exists. The plaintiff is required to state in his pleading whether he claims in fee for life or years. (2 R. S., 304, § 10.) The verdict shall specify the estate which shall have been established on the trial by the plaintiff whether in fee for life or for years. (Id., 307, § 30.)

Every judgment rendered upon a verdict shall be conclusive as to the title established in the action against the party, and all persons claiming under him. (Id., 309, § 36; Code, § 455; and see *Sheridan v. Andrews*, 49 N. Y., 478.) And so it is with a judgment entered upon the report of a referee, or the decision of a judge trying a cause without a jury. (Laws of 1862, chap. 485, p. 977.)

We have to revert to the judgment roll, to ascertain whether the court was right in giving the direction to find a title in fee in the plaintiffs in this action. The former action was tried by a referee. In the judgment entered upon his report there is no mention made of the title of the plaintiff, more than there is in the judgment in this action. In the report of the referee there is not specific expression that the plain-

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tiff has a title in fee for life or for years. The complaint in that case makes a claim to a title in fee, and bases it upon averments, of the conditions in the indenture, that if any covenant or prior condition should not be kept, the lessor or his heirs or assigns might re-enter, and again have, repossess and enjoy the granted premises as in the former estate, and expel the lessee and his heirs and assigns; and upon averments of the non-performance of the covenant to pay rent, of notice to the defendant of the intention of the plaintiff to re-enter, in pursuance of the act of 1846. (Laws of 1846, p. 369, chap. 274.) The answer of the defendant takes issue upon all these averments. The report of the referee finds upon the issue in favor of the plaintiff, specifically finding the covenant for the payment of rent, the condition that if the rent should not be paid for twenty-eight days after day of payment the lessor or his assigns might re-enter and have, repossess and enjoy the former estate, and expel the lessee and his assigns, and that the indenture should become void, on the non-payment of rent, and the giving of notice of re-entry by reason thereof. The report concludes, as matter of law, from these and other findings of fact, that the plaintiff is entitled to recover and to have possession. The report did find then, as fact, that there was a grant in fee of the lands, with a charge upon them of a yearly rent in perpetuity, to the grantor, his heirs and assigns, with clauses for an entry and for distress for rent. The interest in the rent owned by the grantor, as matter of law from those facts, was an estate in it in fee simple. (2 Wash. on Real Prop., 253 [\* 8]; and see *Farley v. Craig*, 11 N. J. L. R. [6 Halsted], 262.) It was such an interest in land as may be levied upon for the debt of him who owns it. (Id.; *The People v. Haskins*, 7 Wend., 463.) The appellant contends that there was no reversion of the estate. Let it be granted, for that is not the dispute which the respondents make. They claim a forfeiture of the estate of the appellant and his predecessor, and a restoration to them, as the assignees of Stephen Van Rensselaer, of the estate which he did possess and enjoy before and at the time

of the execution by him of the indenture. The referee did find, as fact, that there was a right of re-entry and repossession of the former estate, and an avoidance of the lease or grant in fee. As a matter of law from this fact a conditional estate was constituted in the grantor (2 Wash. on Real Prop., 257 [\* 9]), and a right in him or his assigns to enforce it by action in ejectment. (*Marshall v. Conrad*, 5 Cal., 364, 405; *Van Rensselaer v. Ball*, 19 N. Y., 104-106; *The Same v. Slingerland*, 26 id., 586; *The Same v. Dennison*, 35 id., 400.) There is found in the instrument a condition, which is in the nature of a forfeiture, which at law casts the whole estate upon the grantor whenever it is broken. (*Stephenson v. Haines*, 16 Ohio St., 478.) There may have been, and probably was, the equitable right to be relieved against the forfeiture, but that is not now involved. And this conditional estate had this extent, by virtue of the terms of this indenture, that the owner of it might re-enter and his former estate have and hold, and the grantee quite oust; for the estate of the grantee is defeasible if the condition be not performed. (2 Inst. [Thomas' ed.], § 325, p. \* 3.) Here the appellant cites to us the cases of *Haverhill v. Hare* (Cro. J., 510), and *Jemot v. Cooly* (Sir T. Raym., 135-158). But the distinction between those cases and this is well shown in *Farley v. Craig* (*supra*; 11 N. J. L. R. [6 Halsted], 262). It rests upon the difference in the terms of the covenants and conditions. In those cases the right to hold on re-entry was only for so long as needful to get from the land the rents in arrear. By those terms there was created only an interest in the profits. The case is different here. The appellant is in error in his assertion that the right of re-entry gave only a usufructuary interest. Here the terms make a forfeiture of the land itself, and a restoration of the grantor's former estate and title. And see *Jemot v. Cooly*, as reported 1 Levinz, 170, where TWYSDEN, J., is stated to have said: "That if it was not for the words, *and to retain till he be satisfied out of the profits*, it would have been an inheritance in the land to remain in the heir as a penalty." Now this condition, in the instrument

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in this case, is a lawful condition imposed upon the estate of the predecessor of the defendant (*De Peyster v. Michael*, 6 N. Y., 497; *Van Rensselaer v. Hays*, 19 id., 76, 77), and obligatory upon the parties, and in default of performance the consequences imposed by the terms of the instrument must be endured, one of which is the right to re-enter and have again the estate formerly possessed by the party of the first part to the instrument. That was an estate in fee simple in the land. It matters not that the referee did not in terms express a conclusion of law to that effect. Such a conclusion is involved in the issues found by the pleadings. It flows necessarily from the facts found, and no fact is found which is hostile to it. We conclude, then, that the learned justice at the Circuit was not in error in directing a verdict of a title in fee simple in the lands in the plaintiffs.

The learned justice also directed the jury to find for the plaintiffs \$850 for withholding the possession of the premises. Upon the exception taken to this direction the point is now made, that there was no testimony upon which a verdict for more than nominal damages for withholding possession could have been legally based. The exception taken was general and did not point out the specific difficulty now raised, which is, that testimony of the value of the annual use and occupation is not competent upon an issue of the amount of damages for withholding the possession of lands, though it is competent in an action for the *mesne* rents and profits. The case cited by the appellant, of *Larned v. Hudson* (57 N. Y., 151), does hold, that where testimony of the value of the use and occupation is offered upon the issue of the amount of damages, by withholding possession, an objection to the admissibility was good, and that an exception to a charge instructing the jury to consider such testimony upon that issue, was also good. But that case is not a precedent for this. There was no allegation in the complaint in that case of the value of the use and occupation. The only mention of damages was in the demand of judgment. The Code provides, that in an action to recover the possession of lands, a claim may also be

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made for the *mesne* profits. (Code, § 167.) The allegation in the second cause of action in the complaint in this action was, in substance, that which is required by the Revised Statutes for a suggestion on the record of a claim for *mesne* profits. (2 R. S., 310, §§ 44, 45; Yates' Pleadings, 195.) There was no objection to the testimony, (when it was received), which showed the value of the use and occupation, nor was the exception to the direction now complained of so pointed as to call the attention of the court and counsel to the position now taken. We do not think that the facts of this case bring it within the principle in 57 New York (*supra*). It is true that the judgment entered herein does speak of the sum recovered as damages for the withholding of the possession. But that is not an error brought up by the exception. It is, indeed, an irregularity in the entry of judgment which would have been corrected on motion.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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| e 78 AD | 111 |

MICHAEL L. DOYLE et al., Appellants, v. SAMUEL LORD et al., Respondents.

Plaintiffs leased the first floor of a building in the city of New York for a store. In the rear was a yard attached to and exclusively appropriated for the use of the building, to which all the occupants had access through a hall running from the front to the rear of the building, and as the building was occupied when plaintiffs leased, no tenant could dispense with it. The rear of the store received light necessary for the transaction of business therein from windows opening into the yard. A door opened from the store into the yard and one into said hall. The lessor consented that plaintiffs might close up these two doors at his own expense to make shelf room. Defendants, having leased the whole premises, subject to plaintiffs' lease, began to excavate in the yard for the purpose of building thereon. In an action to restrain such building, *held*, that plaintiffs by their lease acquired an easement in the yard, of which they were not deprived by the agreement as to closing the doors;



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that even if it should be held from the fact of closing the doors, that it was not the intention by the lease to give them access to the yard, yet they were entitled to enjoy an easement therein for the purposes of light and air, and defendants could not change it to their disadvantage.

The authorities establishing the American doctrine, so called, as to light and air, recognized and distinguished.

(Argued February 22, 1876; decided March 21, 1876.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York affirming a judgment in favor of defendants, entered upon an order dismissing plaintiffs' complaint on trial. (Reported below, 7 J. & S., 421.)

This action was brought to restrain defendants from building upon a yard in the rear of plaintiffs' store, in the city of New York. The facts are set forth sufficiently in the opinion.

*A. J. Vanderpoel* for the appellants. Plaintiffs were entitled to use the yard in common with the other tenants. (*Whitney v. Olney*, 3 Mason, 280, 284; *Sheets v. Selden's Lessee*, 2 Wall., 177, 187; *Shep. Touch.*, 189; *Voorhees v. Burchard*, 55 N. Y., 98; *Sparks v. Hess*, 15 Cal., 186; *Comyn's Dig.*, title, Grant, E., 6; *Doe ex dem. Clemments v. Collins*, 2 T. R., 498, 502; *Kiddle v. Littlefield*, 53 N. H., 503; *Huttemeier v. Albro*, 18 N. Y., 48.) The lease "being with the appurtenances," the land passed as appurtenant to the building. (*Doane v. Broad St., etc.*, 6 Mass., 332; *Taylor's L. & T.*, § 161; *Comyn's Dig.*, title, Grant, E., 9; *U. S. v. Appleton*, 1 Sum., 500; 8 N. Y., 387; 18 id., 48; *Browning v. Dalesme*, 3 Sandf., 13; *Royce v. Guggenheim*, 106 Mass., 201, 205.) The right to light and air from the yard was an incident and appurtenant to plaintiff's grant. (*Lampman v. Milks*, 21 N. Y., 505; *Havens v. Klein*, N. Y. C. Pleas, Mch., 1875; *Butterworth v. Crawford*, 46 N. Y., 349; *Canaday v. Stiger*, 55 id., 452, 454; *Palmer v. Fletcher*, 1 Levins, 122; *Robbins v. Barnes*, Hobart, 131; *Coutts v. Gorham*, 1 M. & M., 396; *Riviere v. Bower*, R. & M., 24; *Story v. Odin*, 12 Mass., 157; *Myers v. Gemmel*, 10 Barb., 543; *Compton v. Richards*, 1 Price, 27.) The closing of a

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portion of the windows and afterward increasing the size did not affect plaintiffs' right to relief. (*Tapling v. Jones*, 11 H. of L. Cas., 290, 307, 311, 320; *Straight v. Burn* [L. R.], 5 Ch. App.; 163.) The court should have received the proof offered as to the use of the yard by the tenants over the store. (Taylor's L. & T., § 160; *Keats v. Hugo*, 115 Mass., 204.)

*T. D. Pelton* for the respondents. Defendants took title subject only to such charge or incumbrance as Ann Gillett had created. (*Moore v. Rawson*, 3 B. & C., 340; *Cross v. Lewis*, 2 id., 628; *Parker v. Foote*, 19 Wend., 315; 2 Washb. on R. P. [3d ed.], 317; *Keats v. Hugo*, 115 Mass., 204; *Mayor, etc., v. Mabie*, 13 N. Y., 155; *Kinney v. Watts*, 14 Wend., 38; 1 R. S. [Edm. ed.], 689, § 140.) A grant cannot be extended by implication. (*Grant v. Chase*, 17 Mass., 441; 3 Cruise Dig., 47, art. 51.) The grant of an easement of light and air is not implied from the grant of a building having windows overlooking land retained by the grantor. (*Keats v. Hugo*, 15 Am. R., 80, 91; 115 Mass., 204; *Randall v. Sanderson*, 11 id., 114; *Collier v. Pierce*, 7 Gray, 18; *Haverstick v. Sipe*, 33 Penn., 368; *Mullin v. Striker*, 19 Ohio, 135; *Morrison v. Marquand*, 24 Iowa, 35; *Janes v. Jenkins*, 34 Md., 1.) A grant of an easement is void without note or memorandum in writing. (*Wolff v. Frost*, 4 Sandf. Ch., 92; *Houghtaling v. Houghtaling*, 5 Barb., 379; *Miller v. Aub. and S. R. R. Co.*, 6 Hill, 61; *Pitkin v. T. I. R. R. Co.*, 2 Barb. Ch., 221.) The enlargement of the windows by plaintiffs was an act of ownership, which, as tenants, they had no right to exercise. (*Agate v. Lowerbeir*, 57 N. Y., 614; *Selden v. Del. and Hud. C. Co.*, 29 id., 634, 639; *Buck v. Story*, 2 C. & P., 465; *Garrett v. Sharp*, 3 Ad. & El., 325.) The enlargement of the windows was in effect an abandonment of the original easement and the substitution of another. [G. & W. on Easements, 374, 376; *Elliott v. Rett*, 5 Rich. [S. C.], 406; *Pope v. O'Hara*, 48 N. Y., 447; 3 Phil. Ev. [C. & H. Notes], 372; 3 Ad. & El., 325; Washb. on Easements [3d ed.], 629; *Butterworth v. Crawford*, 46

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N. Y., 349.) Plaintiffs were not entitled to relief on the ground that defendants had removed the privies from and occupied the premises in the rear yard. (*Grant v. Chase*, 17 Mass., 441; *Manning v. Smith*, 6 Conn., 291; 3 Cruise Dig., 272.) There can be no presumption that the lease carried with it any thing beyond the premises described. (Phil. on Ev. [C. & H.], 1403, note 956; 1 Greenl. on Ev., § 286; *Cary v. Thompson*, 1 Daly, 35; *Doe v. Burt*, 1 T. R., 704.) The court will not restrain by injunction from doing an act already done. (Thomp. on Prov. Rem., 207; *Moreland v. Richardson*, 22 Beav., 604; *Pitkin v. Warren*, 6 How. Pr., 348.) Plaintiffs are not entitled to relief without showing that the acts complained of will injure them. (Code, § 219; *Wetmore v. Story*, 22 Barb., 496.)

EARL, J. On the 26th day of July, 1870, Ann Gillett owned a building, No. 85, on Forsyth street, in the city of New York, five stories high, twenty-five feet wide on the street, and fifty-one feet deep, upon a lot twenty-five feet wide and seventy feet deep. The lower story was then occupied as a store, and the upper stories, by families. The space of nineteen feet in the rear of the building was a vacant yard, with the exception of privies thereon, having no communication with any street, and then, apparently, useful for no purpose except as appurtenant to the building. There was a hall-way on the southerly side of the building, extending the whole length thereof, with a door at each end, giving access to the yard; and there was then a door from the lower story into this hall-way, and also in the rear of the store into the yard. There were also two windows in the rear of the store, from which light and air entered the store. The privies were manifestly built to be used with the building, and for the accommodation of its tenants; and we must assume, if it is material, as plaintiffs offered to prove it upon the trial, that the tenants had access to the vacant space and to the privies. While the privies were in this condition, on the day above mentioned, Mrs. Gillett rented the store on the first floor,

with the appurtenances, to the plaintiffs, to be occupied as a dry-goods store for the term of five years from the 1st day of May, 1871. The plaintiffs then bought out the prior tenant, and immediately took possession, and continued in the possession of the store down to the trial of this action.

At the time of the lease, the plaintiffs occupied a store on the southerly side of Grand street, a street running east and west, at right angles with Forsyth street, and the rear of that store butted against the rear half of the northerly wall of the Gillett store, and it was agreed that the doors opening from the store into the hall-way and yard should be bricked up to make place for shelves in the store, and that an opening should be made in the northerly wall of the Gillett store and the rear wall of plaintiffs' store, so as to make a communication between the two stores. The plaintiffs did not use the privies on the Gillett lot, as they had one in their own store convenient for use for both stores.

On the 1st day of May, 1874, the defendants took a lease of the whole building and lot No. 85, Forsyth street, for ten years, subject to plaintiffs' lease, and commenced to excavate in the yard for the purpose of building thereon, and then plaintiffs commenced this action to restrain them.

If the plaintiffs had hired the whole building with the appurtenances, their right to the yard could not have been questioned. The yard belonged to the building and was appropriated to its use, and would pass under a lease of the building as a part of the premises demised. The lease would have such effect, because it would be the presumed intention of the parties. In Sheppard's Touchstone (94) it is said that the grant of a messuage, or a messuage with the appurtenances, will pass the dwelling-house, barn, adjoining buildings, orchard, curtilage and garden. In Comyn's Digest (title, Grant, E. 6) it is said "by the grant of a messuage or house, the garden, orchard or curtilage pass." In *Whitney v. Olney* (3 Mason, O. R. Reps., 280) it was held that a devise of a mill with appurtenances, conveyed not the buildings merely, but the land under and adjoining which is necessary

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to the use, and actually used with it. In *United States v. Appleton* (1 Sumner, 492) Judge STORY said: "The general rule of law is, that where a house or store is conveyed by the owner thereof, every thing then belonging to and in use for the house or store, as an incident or appurtenance, passes by the grant. It is implied from the nature of the grant, unless it contains some restriction, that the grantee shall possess the house in the manner and with the same beneficial rights as were then in and belonged to it."

In the case supposed the yard would have passed with the store, not by force of the word "appurtenances," but as portions of the premises demised. (*Riddle v. Litchfield*, 53 N. H., 503.) If all the rooms in the building had at the same time been rented to different tenants, each taking his room with the appurtenances, and no mention had been made of the yard, a different case would have been presented. The demise of a room in the building would pass no portion of the yard. Each tenant would take only the room which he hired, and would take no other portion of the premises. Whatever else he took would be by virtue of the word "appurtenances." That word would give him whatever was attached to or used with the premises, as incident thereto, and convenient or essential to the beneficial use and enjoyment thereof, and he would take any easement or servitude used or enjoyed with the demised premises. (2 Wash. on Real Prop., 667; Wash. on Eas., 32; *Sheets v. Selden's Lessee*, 2 Wall., 177; *Riddle v. Litchfield*, *supra*; *Voorhees v. Burchard*, 55 N. Y. 98; *Huttemeier v. Albro*, 18 id., 48.) It would not give him an interest in the yard as a portion of land demised, because land cannot pass as appurtenant to land, but it would give him an easement in the yard in common with all the other tenants, for all purposes for which it could be used in common — for access to the privies, for playground for children, and for light and air for rooms in the rear of the building.

If the different rooms in the building were leased at different times with the appurtenances, the same result would

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follow. Each tenant would have an easement in the yard. Such, in the absence of restrictive words, would be the manifest intention of the parties, and no rule of law stands in the way of giving effect to such intention.

The yard was attached to and appropriated for the use of the building. The privies were built for the use of the occupants of the building, and the yard was essential to the beneficial use thereof, and as the building was occupied when plaintiffs took the lease, no tenant thereof could well dispense with the use of the yard. The building was so constructed and arranged that all the tenants had access to the yard, and there was no other apparent purpose to which the yard could be subjected. Hence, within every authority to which our attention has been called, the plaintiffs, when they took their lease, acquired an easement in the yard, unless facts to which I will now call attention, deprive them thereof. It was agreed between them and their lessor at the time they took their lease, as above stated, that the doors leading from their store into the yard and into the hall-way should be closed up at the expense of the lessor. This agreement was not for the benefit of the lessor, and was not made to cut off any rights which the lessees would otherwise have, but it was made at the request of the lessees and for their benefit, to give them more room for shelves. Having a privy in their own store on Grand street, so long as they used the two stores together, they did not need the use of a privy in the yard. But they did nothing and agreed to nothing depriving themselves of the right to use the privies. They still had access to the yard. There was the hall running the whole length of the south side of the building, with a door opening into the yard at the rear end. This was a way leading into the yard, and in the absence of any restriction all the tenants had the right to use it for access to the yard. The plaintiffs could at any time have had access to the yard and privies through this hall, and could have used them in common with the other tenants.

But even if it should be held that the fact of closing up the doors, and the fact that plaintiffs had a privy of their own,

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showed that it was not the intention by the lease to give them access to the yard, yet there is nothing to indicate that they were to be deprived of the light and air from the yard. They hired the lower story for a store and the rear windows were the only means to procure light (except artificial) for the proper transaction of business in that part of the store. The light passing into the windows from the yard was essential to the beneficial use of the store, and it was clearly the intention at the time the lease was made that plaintiffs should have it. To this extent, in any view of the case, the plaintiffs were entitled to enjoy an easement in the yard. They were so far interested in it, that the defendants could not change its condition to their detriment.

This conclusion is reached without any departure from what may be called the American doctrine as to light and air, as distinguished from the English common law doctrine, and the law as laid down in the following authorities is fully recognized: *Parker v. Foote* (19 Wend., 315); *Palmer v. Wetmore* (2 Sandf. Sup. C. R., 316); *Myers v. Gemmel* (10 Barb., 537); *Mullen v. Stricher* (19 Ohio State, 135); *Haverstick v. Sipe* (33 Penn. State, 368); *Keats v. Hugo* (115 Mass., 204). Under these authorities, if the lessor had sold the store and lot upon which it stood, twenty-five feet by fifty-one, the grantee would have taken no right to light and air from the balance of the lot. In that case the grantor could have built upon the balance of the lot, and thus have darkened the windows in the store without violating any rights of the grantee. In this case, if the yard had not been part of the lot upon which the building was standing and if it had not been appropriated to use with the building so as to pass as appurtenant thereto, so far as to give easements therein to the tenants of the building, the plaintiffs could not have complained of the acts of the defendants alleged in the complaint.

I am, therefore, of opinion that defendants had no right to enter upon the yard and appropriate the same exclusively to their use, and thus deprive plaintiffs of all use of the same, and of the light and air passing over the same.

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Judgment reversed, and new trial granted, costs to abide event.

All concur.

Judgment reversed.

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CHRISTIAN H. VOLTZ, Respondent, v. ABEL J. BLACKMAR, Appellant.

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Where exemplary or punitive damages are claimed in an action, all the circumstances immediately connected with the transaction, tending to exhibit and explain the motive of defendant as to show upon the one side that he acted maliciously, or upon the other that he acted in the honest belief that he was justified in what he did, or acted under the impulse of sudden passion or alarm caused by plaintiff's conduct, are admissible in evidence.

In an action for assault and false imprisonment, it appeared that plaintiff was the confidential clerk and agent of defendant, having charge of his business in New York, with power of attorney authorizing him to sign and indorse checks, notes, etc. After receiving notice that his services were not required for another year, he, without defendant's knowledge, drew from the bank \$4,000, on a check signed by him in defendant's name and deposited the same, receiving a certificate of deposit payable to his own order. Defendant was indebted to plaintiff at the time about \$3,800, and, as the latter alleged, he drew the check to pay the sum owing him. On being advised of this, defendant went to his office in New York and demanded the money, and upon plaintiff's refusal to restore it, discharged him. Plaintiff thereupon took from the safe the certificate of deposit and certain negotiable warehouse receipts belonging to defendant, and, without the knowledge of the latter, carried them away. Defendant, being advised of the fact, sent for an officer, and on plaintiff's return and refusal to surrender the papers, the arrest complained of was made. The court was requested to charge the jury that there was no justification for plaintiff's possession of the warehouse receipt, to which the court responded: "The private rights of these parties are not before the jury." *Held*, error; that the charge requested should have been given, and the proposition stated was erroneous; that the facts were proper to be taken into consideration as bearing upon defendant's motive.

Also, *held*, that the act of plaintiff in drawing the money was unauthorized and unjustifiable; that the power of attorney gave him no authority to adjust his account or to draw defendant's money to pay a debt due to



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himself. An agent cannot act in matters touching his agency so as to bind his principal where he has himself an adverse interest.

(Argued February 24, 1876; decided March 21, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department affirming a judgment in favor of plaintiff, entered upon a verdict, and affirming an order denying a motion for a new trial.

This action was for assault and battery and false imprisonment. The defendant was a dealer in malt, residing and doing business in the city of Buffalo, and during the years 1872 and 1873 maintained an office at No. 17 Moore street, in the city of New York. On August 20, 1872, he hired the plaintiff as confidential clerk and agent, he taking charge of the New York business for the balance of August, and then one year from the 1st of September, 1872, for the salary of \$2,500 per year. Defendant executed a power of attorney, authorizing the plaintiff to sign checks, indorse checks, notes, drafts and bill of exchange; also to accept drafts and bills of exchange.

Prior to September 1, 1873, defendant wrote to plaintiff to the effect that he was doubtful whether he would require his services another year, but requesting him to remain until September 15. Plaintiff continued until September 6, 1873. On that day he drew a check on the bank where the defendant deposited, upon defendant's account, for \$4,000, and immediately went to the bank and procured a certificate of deposit for that amount in his own name. Defendant at that time owed him \$3,000 on a note for borrowed money and about \$800 on account.

On the same day the defendant arrived in New York city he notified the plaintiff that he was discharged from his employment, and told him to leave. He also demanded the return of the \$4,000. The plaintiff refused to return it. Then plaintiff went to the defendant's safe in the office without his knowledge and took from it an envelope containing, among other things, three warehouse receipts running to the

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Opinion of the Court, per ANDREWS, J.

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from the safe the warehouse receipts, although there is no room for question that these acts were without justification, and constituted a flagrant violation of the defendant's rights, and of the duty the plaintiff owed to his employer. But as the plaintiff's arrest and imprisonment, upon the facts found, was not justified, he was entitled to recover the damages sustained thereby.

The judge instructed the jury that they were not confined, in awarding damages, to giving compensation merely for the injury sustained by the plaintiff, but that beyond this they might award damages to any extent by way of punishment to the defendant, and as a warning to others against committing like offences. In vindictive actions, as they are sometimes termed, such as libel, assault and battery and false imprisonment, the conduct and motive of the defendant is open to inquiry, with a view to the assessment of damages; and if the defendant, in committing the wrong complained of, acted recklessly or willfully and maliciously, with a design to oppress and injure the plaintiff, the jury, in fixing the damages, may disregard the rule of compensation, and beyond that may, as a punishment to the defendant, and as a protection to society against a violation of personal rights and social order, award such additional damages as in their discretion they may deem proper. The same rule has been held to apply in the case of a willful injury to property, and in actions of tort founded upon negligence, amounting to misconduct and recklessness. (*Tillotson v. Cheetham*, 3 J. R., 56; *King v. Root*, 4 Wend., 113, *Tift v. Culver*, 3 Hill, 180; *Cook v. Ellis*, 6 id., 466; *Burr v. Burr*, 7 id., 207; *Taylor v. Church*, 8 N. Y., 460; *Hunt v. Bennett*, 19 id., 174; *Millard v. Brown*, 35 id., 297.)

In actions for assault or for false imprisonment, the damages are, from the nature of the injury claimed, incapable of exact ascertainment. If the cause of action is made out, the plaintiff is entitled to compensation, to be ascertained by the jury, whatever may have been the motive which actuated the defendant. But it is the constant practice

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in actions for assault and battery to allow the defendant, in mitigation of damages, to show that the plaintiff provoked the assault by which he was injured, and the jury are allowed to consider the provocation, if immediate, in awarding damages and in determining how much of the injury is justly attributable to the defendant. Where exemplary or punitive damages are claimed, all the circumstances immediately connected with the transaction, tending to exhibit or explain the motive of the defendant, are admissible in evidence. The plaintiff on his part may show that there was express malice, and, on the other hand, the defendant is entitled to the benefit of any circumstances tending to show that he acted under an honest belief that he was justified in doing the act complained of, or under immediate provocation, or the impulse of sudden passion or alarm, excited by the conduct of the plaintiff. The law takes notice of the frailties of human nature, and even where human life is taken by a criminal act, it distinguishes between a deliberate killing and a killing in the heat of passion, and graduates the degree of the crime and the punishment, in view of this circumstance. The facts which led to the arrest and imprisonment of the defendant, although not upon the finding of the jury justifying it, might, if the jury had been allowed to give them their full weight, have mitigated the damages awarded. The plaintiff was the confidential clerk and agent of the defendant, who resided at Buffalo, and was conducting his business of the sale of malt in the city of New York. He had been employed by the year at a fixed salary, and his employment terminated under his contract on the 1st of September, 1873. He had charge of the defendant's office in New York, and held a power of attorney to sign and indorse checks, notes, drafts and bills of exchange, and to accept drafts and bills for his principal. The defendant kept a bank account at the Fourth National Bank of New York, upon which the plaintiff drew checks in the name of his principal in the course of the business. The defendant, by letter dated the twenty-ninth of August, written at Buffalo, in response to a letter

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from the plaintiff, informed him in substance that his services would not be required for another year, but expressed the desire that he would remain in New York until the fifteenth of September, and if he did not wish to remain, that he would so inform him, and he would go to New York and take charge of the office. The plaintiff remained in charge of the office until the sixth of September. On the fifth of September, without the defendant's knowledge or authority, he drew from the bank \$4,000 on a check signed by him in the defendant's name, and deposited it to his own credit in the same bank, taking therefor a certificate of deposit payable to his own order. The check was drawn against funds of the defendant, and after payment of this check there remained in the bank about \$1,000 to the defendant's credit. The plaintiff on the same day advised the defendant at Buffalo by telegraph, that he had drawn 'the check for \$4,000 — "my account" — which was the first knowledge which the defendant had of the transaction. The defendant at the time was indebted to the plaintiff in the sum of about \$3,800, of which \$3,000, or thereabouts, was for money loaned by the plaintiff to him, and the balance for arrears of salary.

The plaintiff alleges that he drew the check to pay the sum owing him by the defendant, including in the amount, salary for the whole month of September. He at this time held a demand note of the defendant for \$3,000, given for part of this indebtedness. It is not open to question that this transaction was unauthorized, and without justification. The power of attorney which the plaintiff held, gave him no authority to adjust by his sole act the account between himself and the defendant, or to draw from the bank the defendant's money to pay a debt to himself.

It is a rule which stands upon the solid basis of reason and common sense, than an agent in matters touching the agency, cannot act so as to bind his principal when he has an adverse interest in himself. The law will not permit a conflict in this way between his interest and his duty, and removes the temptation to wrong, by absolutely disabling him in such a

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case from acting for himself, and at the same time for his principal.

The power of attorney is to be construed in the light of this rule, and it authorized the plaintiff to act for the principal, and in his business with third persons, but not for himself, or in business in which the plaintiff and defendant were mutually and adversely interested. (*Clafin v. The Farmers and Citizens' Bank*, 25 N. Y., 293; Story on Agency, §§ 210, 211.)

The check drawn by the plaintiff included not only the debt actually due from the defendant, but salary in advance for the month of September, when there could be no pretence of an employment beyond the fifteenth of that month.

The defendant, on receiving the telegram advising him of the drawing of the check, went to New York, reaching there on the sixth, and found the plaintiff at the office, and demanded that he should return the money, which he refused to do, and thereupon he discharged the plaintiff from his employment. The plaintiff then went to the safe in the defendant's office and took therefrom an envelope containing the certificate of deposit for \$4,000, some private papers of his own, and bank vouchers, and three negotiable warehouse receipts for about 35,000 bushels of malt, worth \$50,000, representing malt belonging to the defendant, held in store for him in New York, and deliverable on the production of the receipts indorsed by him. The plaintiff put these papers in his pocket and left the office. After he had gone, the defendant (as he testified), was informed by another clerk that the plaintiff had taken the receipts and papers and this was the first knowledge he had of the fact. Police officers were sent for, and the plaintiff having returned to the office, the papers were demanded of him by the defendant, and he refused to surrender them. The plaintiff testified that he offered to return them if the defendant would receipt them to him, but this is denied by the defendant. The arrest soon followed, and the plaintiff was placed in a cell at the station-house, where he remained until the next

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Opinion of the Court, per ANDREWS, J.

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morning, when he was discharged by the magistrate before whom he was brought, on the ground that the matter was of civil and not of criminal cognizance.

The evidence in the case tends to show that the defendant exhibited great anxiety to recover the possession of the warehouse receipts, and this was entirely natural. They were negotiable by his indorsement. It is quite probable that the actual authority of the plaintiff did not include a power to transfer them by indorsement in the defendant's name, although it appeared that the plaintiff bought and sold malt for the defendant. But a transfer by the plaintiff for value would subject the defendant to embarrassment, if not loss. The plaintiff testified that after he had taken the papers he said to the defendant, "I shall go to Buffalo and settle my matters," and a threat of a retention by the plaintiff of the evidence of the defendant's title to the malt may well be supposed to have excited and alarmed him.

The pretence which the plaintiff set up on the trial, of a right to the possession of the receipts and vouchers, was idle and groundless. They belonged to the defendant, and not to the plaintiff, and the defendant was entitled to their possession. Nor does it appear that the plaintiff, in procuring the money from the bank, or in taking the papers from the safe, had the excuse even that he was acting under any apprehension that his debt was insecure, nor, so far as it appears, had the defendant sought to evade its payment. The plaintiff knew that the defendant was a man of wealth, and that debts against him were collectible.

We have deemed it proper to refer to some of the facts in this somewhat extraordinary case, with a view to a proper understanding of an exception to the charge of the judge on the trial, upon which the judgment must, we think, be reversed.

The judge having charged that the jury were at liberty to give vindictive damages, was asked by the defendant's counsel to charge that "there is no justification offered in the case for the plaintiff's possession of the warehouse receipts."

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The court, in response, said: "I say the private rights of these parties are not before the jury," and to this observation the defendant's counsel excepted. The request was, we think, a proper one, and the charge requested should have been given. The judge did not, in terms, refuse to charge the proposition stated, but he answered the request by a counter-proposition, which was, we think, erroneous, and the exception thereto was well taken. The facts heretofore referred to in respect to the taking of the warehouse receipts were proper to be taken into consideration by the jury, as bearing upon the motive of the defendant. Assuming, as we must, that the imprisonment of the plaintiff was illegal, the jury might very well have found extenuating circumstances, and that the defendant acted, in directing his arrest, in good faith, without malice, or under a high degree of excitement, created by the circumstances immediately preceding the arrest. What force should be given to these and like considerations it was for the jury to determine; but the charge withdrew material facts, tending to mitigate the damages, from their consideration, and for this reason the judgment should be reversed, and a new trial ordered.

All concur.

Judgment reversed.

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FRANCIS VOSE, Respondent, v. DAVID L. YULEE, Appellant.

This action was brought originally against several defendants. Upon a former trial the complaint was dismissed as to all. Upon appeal to this court the judgment was affirmed as to all the defendants except Y., and reversed as to him and new trial granted. Y. thereupon filed a petition to remove the cause to the United States Court, under the act of July 27th, 1866 (14 U. S. Stat. at Large, 306), providing for a removal where one of several defendants is a resident of another State. *Held*, that the attempted removal was ineffectual, as at the time Y. was the only defendant, and that the court could take judicial notice of the fact from its own records.

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Also, *held*, that Y. could not have made a case for removal as the action was originally, it being a claim against all the defendants upon a joint liability in equity.

Where a party attempting to remove a cause omits to apply to the United States Court for a mandate staying proceedings in the State court, that court will not oust itself of jurisdiction unless such party shows that he has strictly complied with the statute.

(Argued February 24, 1876; decided March 21, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of plaintiff entered upon a verdict.

This originally was an equitable action brought against The Florida Railroad Company, defendant Yulee and others, founded upon certain promissory notes made by said company and a portion of which were indorsed by defendant Yulee, which notes were secured by internal improvement bonds of the State of Florida, which were a first mortgage upon said company's road. The road was sold upon foreclosure, and the plaintiff claimed that the sale inured to his benefit and the relief prayed for was that the defendants should be deemed trustees for plaintiff of the rents, profits and income of the road. The complaint was dismissed upon trial, and the judgment entered thereon was affirmed by the General Term. On appeal to this court the judgment was affirmed as to all the defendants, except the defendant Yulee, and as to him it was reversed and a new trial granted. (See 50 N. Y., 369.) After the filing of the remittitur and before the cause came on for a second trial, the defendant Yulee filed his petition with notice of motion for a removal of the cause into the United States Circuit Court under the act of July 27, 1866. (14 U. S. Stat. at Large, 306.) The motion was made and denied. Upon the trial defendant's counsel moved to dismiss the complaint for want of jurisdiction, on the ground that the cause had been removed, which motion was denied. Further facts appear in the opinion.

*Edw. N. Dickerson* for the appellant. Defendant was not obliged to appeal from the refusal to grant an order of



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removal or to procure a stay. (*Kenouse v. Martin*, 14 How. [U. S.], 23; 15 id., 199.) This was a case that could be properly removed into the United States Court. (14 U. S. Stat. at Large, 306.) The right of removal exists at all times up to final trial, even when a jury is impaneled. (*Ackerly v. Vilas*, 1 Abb [N. S.], 284.)

*Samuel Hand* for the respondent. The motion to dismiss the complaint for want of jurisdiction was properly denied. (*Bell v. Dix*, 49 N. Y., 238; 2 R. S. [Edm. ed.], 412, § 25; Laws 1869, chap. 133; *Florence v. Butler*, 9 Abb. [N. S.], 63; *Dunn v. Ins. Co.*, 19 Wall., 214.) The motion to dismiss the complaint on the ground that there was no cause of action was properly denied. (*Vose v. Fla. R. R. Co.*, 50 N. Y., 376; Code, § 275; *Marquat v. Marquat*, 12 N. Y., 336; *Jones v. Butler*, 20 How., 189; *Armitage v. Pulver*, 37 N. Y., 494.)

CHURCH, Ch. J. The learned counsel for the defendant urges two grounds for a reversal of the judgment.

First, that the action was removed before trial to the Circuit Court of the United States; and second, that evidence was improperly rejected.

An attempt was made to remove the case to the United States court, under the act of 27th July, 1866 (14 U. S. Stat. at Large, 306), which provides for a removal in a case where the action is against more than one defendant, one of whom is a citizen of a State other than the one in which the suit is brought, and as to whom a final determination of the controversy may be had, without the presence of the other parties. The fatal objection to the claim for a removal is, that the defendant Yulee was the only defendant at the time the attempted removal was made. The action originally was against Yulee and several others. Upon the trial the complaint was dismissed as to all the defendants, which was affirmed at the General Term, and, upon appeal to this court, the judgment was affirmed as to all the defend-

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ants except Yulee, and reversed as to him, and a new trial granted. (50 N. Y., 369.) When the *remittitur* from this court was sent down and made the judgment of the Supreme Court, the only defendant to the action was Yulee, and we can take judicial notice of this fact from our own records. The defendant was not, therefore, entitled to a removal of the case under the act of 1866, and it was too late to apply under the act of 1789. Nor could he have made a case under the act of 1866, in the original action, for the reason that the claim was against all the defendants upon a joint liability in equity. When it went back it was substantially an action at law against the defendant as indorser of certain promissory notes. If the action had been brought against him originally in that form, he might have made a case for removal under the act of 1789, but this cannot aid him in making a case under the act of 1866. It is unnecessary, therefore, to determine whether the defendant could avail himself of the point upon the trial, or whether he must seek his remedy by motion, and, if denied, upon appeal from the order.

Assuming that a compliance with the statute operates to remove a case without any action of the court, a State court will not oust itself of jurisdiction unless a plain case is made. The party is at liberty to apply to the United States court for a mandate staying proceedings in the State court, and if he omits to do this, he must at least show that he has strictly complied with the statute. (49 N. Y., 238.)

It was held by this court when the case was here before, that the defendant was entitled to be allowed the value of certain bonds which had been sold without notice, and at the trial the plaintiff was asked if he had not procured an injunction restraining the internal improvement company from selling certain lands, and ordering the payment of bonds. Perhaps this question might have been proper as preliminary to an inquiry as to the value of the bonds in question, but there was no specification of bonds, and no offer or proposition to prove the value of the bonds, and it requires some astuteness to see how the obtaining of an injunction could

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affect the question of value. The relevancy of the question is not apparent, and the counsel did not suggest any additional facts to make it so.

The judgment must be affirmed.

All concur, except RAPALLO, J., not voting.

Judgment affirmed.

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CHARLES H. MEAD et al., Appellants, v. THE WESTCHESTER  
FIRE INSURANCE COMPANY, Respondent.

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To justify a court of equity in changing the language of a written instrument sought to be reformed, in the absence of fraud, it must be established that both parties agreed to something different from what is expressed in the writing, and the proof should be so clear and convincing as to leave no room for doubt.

In an action to reform a policy of fire insurance upon a dwelling-house, the alleged mistake was that an adjoining building was intended to be insured instead of the dwelling described. It appeared that the applicant had owned both buildings and had lived in the one described; that defendant's agent had insured the furniture therein; that he had insured the building claimed to have been intended and the policy was then outstanding. He had the description of both buildings upon his books. The applicant had removed from the dwelling to the adjoining building, which was occupied as a dwelling and paint shop, and did not, in fact, own the former. The agent, however, testified that he supposed that he did. The premium upon the dwelling was one and one-half per cent; upon the building it was two and one-half. The application was, by letter for a policy on "my house." The agent, thereupon, made out the policy in question upon the dwelling, charging one and one-half per cent. The building was burned. The only direct evidence to establish that defendant intended to insure the building was that of the agent who, in answer to the question, "To what property *do* you understand this letter \* \* \* referred?" answered, to the property burned. Upon his cross-examination he testified, in substance, that at the time and before the policy was issued he was in doubt, but his idea was it was on the dwelling and he so made out the policy. *Held*, that the facts did not show an intent, on the part of defendant, to insure the building burned, and did not justify a reformation of the policy.

(Argued February 25, 1876; decided March 21, 1876.)

## Statement of case.

APPEAL from order of the General Term of the Supreme Court in the second judicial department, reversing a judgment in favor of plaintiffs entered upon the report of a referee and directing a new trial.

This action was brought to reform a policy of fire insurance issued by defendant through its agent, one Dales, to Thomas Foley, loss, if any, payable to plaintiffs, and to recover upon the policy thus reformed.

The description of the property in the policy is as follows: "A two-story frame dwelling situated on the north side of Cornwall road at Canterbury, Orange county, New York." The property alleged by plaintiffs to have been intended was adjoining that described, and the alteration desired was by inserting, in place of the description in the policy, the following: "A two and a-half story frame building and the additions attached and occupied as a dwelling and paint shop, with stable in the basement, situated on the north side of turnpike at Canterbury, Orange county, New York." The facts upon which the claim for reformation were based appear in the opinion.

*C. F. Brown* for the appellants. Defendant was liable on the parol agreement to insure Foley's house. (*Bunten v. Orient Mut. Ins. Co.*, 8 Bosw., 448; *Solmes v. Rutgers F. Ins. Co.*, 2 Abb. Ct. App. Cas., 279; *Ellis v. Alb. City F. Ins. Co.*, 50 N. Y., 402.) The mistake of the agent in writing the policy constituted no defence to this action. (May on Ins., 144, § 142; *id.*, 132, § 132; *Plumb v. Cat. Mut. Ins. Co.*, 18 N. Y., 392; *Meadoncraft v. Stand. F. Ins. Co.*, 61 Penn., 91; 4 Abb. Ct. App. Cas., 279; 1 *id.*, 257; 8 Bosw., 448; *Hughes v. Mer. Mut. Ins. Co.*, 55 N. Y., 270; *Rowley v. Em. Ins. Co.*, 36 *id.*, 550.) Defendant is estopped by the act of its agent from asserting that the property destroyed was not covered by the policy. (*Lawrence v. Brown*, 5 N. Y., 394; 18 *id.*, 392; 36 *id.*, 550; *Carroll v. Charter Oak Ins. Co.*, 1 Abb. Ct. App. Cas., 316; *Goit v. Nat. Pro. Ins. Co.*, 25 Barb., 189; *Leslie v. Knick. L. Ins. Co.*, 2 Hun, 616.)

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Opinion of the Court, per RAPALLO, J.

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*C. Frost* for the respondent. As the minds of the parties did not meet there can be no reformation of the contract. (*Bap. Ch. v. Bklyn. F. Ins. Co.*, 28 N. Y., 161; *Kent v. Manchester*, 29 Barb., 595; *Ledyard v. Hart. F. Ins. Co.*, 24 Wis., 496; 1 Alb. L. J., 277; *Hughes v. Mer. Ins. Co.*, 55 N. Y., 265.)

RAPALLO, J. The power of courts of equity to reform written instruments is one in the exercise of which great caution should be observed. To justify the court in changing the language of the instrument sought to be reformed (except in case of fraud), it must be established that both parties agreed to something different from what is expressed in the writing, and the proof upon this point should be so clear and convincing as to leave no room for doubt. Losing sight of these cardinal principles, in the administration of this peculiar remedy, would lead to the assumption of a power which no court possesses, of making an agreement between parties to which they have not both assented.

We think that the General Term were right in holding that the proofs in the present case failed to come up to the required standard. It is reasonably clear that the plaintiffs intended to obtain an insurance upon the building which was afterwards burned. But the question is, whether it is shown that the defendant intended to insure that building.

The policy was issued on the 1st of July, 1871, to Thomas Foley, on his own application, loss, if any, payable to Mead and Taft, the plaintiffs. The property insured was described in the policy as "his two-story frame dwelling, situate," etc. The policy was issued by Mr. Dales, the agent of the defendant. It appeared in evidence that Foley had occupied this dwelling-house for four years prior to the 1st of April, 1871; and that the furniture therein had been insured by Mr. Dales on the application of Foley. Foley owned the adjoining building, which had also been insured by Mr. Dales, in the office of the Home Insurance Company, for \$2,000, and this policy was outstanding when the insurance now in question

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Opinion of the Court, per RAPALLO, J.

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was effected. In April, 1871, Foley removed from the dwelling-house into this building, but Dales testified that he supposed that Foley owned the dwelling-house also, though, in fact, he did not. Dales had on his books the descriptions of both buildings. The dwelling-house was described as a "two-story frame dwelling, situate," etc., and the adjoining building as a "two and a-half story frame building, and the additions attached, occupied as a dwelling and paint shop, with stable in the basement," situate, etc. The established rate of premium upon this building, and that which was then being paid thereon, was two and a-half per cent per annum; that upon the dwelling adjoining was one and a-half per cent. These were the circumstances existing at the time of the application for the policy in question. The application was made in writing by Foley to Mr. Dales, and was in the following words: "I would like you to make me out a policy of \$800 on my house, in favor of Mead & Taft, in case of loss, in the cheapest company." Thereupon, Mr Dales made out a policy for \$800 on the dwelling-house, charging premium at the rate of one and a-half per cent, which policy he delivered to one of the plaintiffs, who paid the premium. The adjoining building, in which the paint shop was kept, was afterwards burned, and the object of this action is to have the policy reformed so as to describe that building.

The only direct evidence to establish that the defendant intended to insure the building which was afterwards burned is the testimony of Mr. Dales, who, on his direct-examination, was asked: "To what property *do* you understand this letter of Foley's referred?" To which he answered: "To the property which he occupied, which has since been burned, and described in my book."

On his cross-examination he was asked: "At the time of issuing this policy, and before it was issued, did you not suppose the application referred to the building Foley formerly occupied? A. I was in doubt about it; the simple question was, if it was on the building in which he lived, it was two and a-half per cent, and if on the one he formerly occupied,

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one and a-half per cent. Q. You issued it for one and a-half; which was it on? A. My idea was it was on the one he formerly occupied."

The purport of this evidence, taken as a whole, is, we think, that at the time of the trial, and in view of the facts which had then been developed, the witness was satisfied that Foley intended, by his letter, to refer to the building in which the paint shop was. But that at the time of issuing the policy the witness concluded that the dwelling-house was the one desired to be insured, and that he intentionally made out the policy to cover this building, charging the lesser rate of premium. These facts do not justify the reformation of the policy.

If the defendant had intended to insure the building which was burned, and had received the premium for that insurance, but by a clerical error the wrong description had been inserted in the policy, a case would be made out for reformation, but those facts are not established. We cannot make a contract for the defendant which it did not, in fact, make, even though the failure to make the insurance which the plaintiffs desired was owing to the defendant's misapprehension of the application.

The order of the General Term should be affirmed, and judgment absolute rendered against the plaintiffs on their stipulation, with costs.

All concur.

Order reversed and judgment accordingly.

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SAMUEL HUBBARD, Appellant, v. JESSE GURNEY, Respondent.

It is competent under the Code for one of two makers of a promissory note, in an action upon the note, to prove by parol that he signed the note as surety, to enable him to interpose as a defence that he was discharged by an extension of time given to the principal with knowledge of the suretyship.

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Such evidence does not alter or vary the written contract, as the fact proved simply operates, when knowledge of it is brought home to the creditor, to prevent him from changing the contract or making a different one with the principal debtor without the consent of the surety, or from impairing the rights of the latter by releasing any security or omitting to enforce the contract when requested.

The authorities upon the question as to the competency and effect of such evidence collated and discussed.

*Campbell v. Tate* (7 Lans., 370) and *Benjamin v. Arnold* (5 T. & C., 54) overruled.

After the maturity of a note signed by defendant, as surety, and held by plaintiff, who had knowledge of the suretyship, the principal debtor executed a new note which was indorsed by plaintiff, discounted and the avails paid to him; when the note matured a small payment was made by the principal and a new note given. In an action upon the original note, *held*, that there was an implied agreement to extend the time of payment, which being done without the knowledge or consent of defendant, discharged him from liability; that the fact that the note in suit was not surrendered did not affect the character of the implied contract or its legal effect; and that the receipt of the money obtained upon the new note was a sufficient consideration, on the part of plaintiff, for such contract.

*Halliday v. Hart* (30 N. Y., 474) distinguished; *Cary v. White* (52 id., 138) distinguished and limited.

(Argued February 25, 1876; decided March 21, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of defendant entered upon a verdict.

This action was brought upon a promissory note, of which the following is a copy :

“ One day from date, for value received, I promise to pay Samuel Hubbard, or bearer, one thousand dollars with use.

“ Dated *April 1st*, 1872.

“ S. H. GURNEY.

“ JESSE GURNEY.”

The answer alleged that defendant signed as surety; that plaintiff by agreement of the principal debtor, without defendant's knowledge or consent, extended the time of payment. It also alleged payment.



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Upon the trial defendant was permitted to prove, by parol, under objection and exception, that the note was given for money loaned to S. H. Gurney, and that defendant signed as surety. It appeared that plaintiff, being desirous of the money, called upon S. H. Gurney after the maturity of the note, for payment, and on being advised by the latter that he could not pay asked him if the money could not be obtained at bank. Gurney promised to ascertain, and getting a favorable answer made his note, dated May 18, 1872, payable to plaintiff's order at thirty days, for \$1,000. This plaintiff indorsed and he received the avails of its discount. Nothing was said at the time about the original note, but it remained in plaintiff's hands. When the new note fell due said S. H. Gurney made another note for \$900 at thirty days, which was indorsed by plaintiff and discounted by the bank, and with the avails and money furnished by Gurney to pay the balance the note first discounted was taken up. Gurney paid \$200 upon this note and then became bankrupt. Plaintiff paid the balance of the note.

The court directed a verdict for defendant, to which plaintiff's counsel duly excepted. A verdict was rendered accordingly.

*Samuel A. Bowen* for the appellant. The court erred in receiving parol evidence that defendant signed the note as surety, as it tended to vary the terms of the written contract. (*Campbell v. Tate*, 7 Lans., 370; 40 Conn., 553; *Spriggs v. Bk. of Mt. Pleasant*, 10 Pet., 263; *Rees v. Barrington*, 2 Ves., Jr., 542; *People v. Jansen*, 7 J. R., 337; *Paine v. Packard*, 13 id., 174; *King v. Baldwin*, 17 id., 384; 2 J. Ch., 554; *Artcher v. Douglass*, 5 Den., 509; *Barry v. Ransom*, 12 N. Y., 462.) The burden was upon defendant to show a valid agreement, either express or implied, to extend the time for payment. (*Halliday v. Hart*, 30 N. Y., 474; *Gahn v. Neimcewicz*, 11 Wend., 312; *Pratt v. Coman*, 37 N. Y., 440, 443; *Cary v. White*, 52 id., 138, 142; *McKechnie v. Ward*, 58 id., 541, 546.) The giving of the new note was

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not payment of the note in suit. (*Bates v. Rosekrans*, 37 N. Y., 409; 23 How., 99; *Vernan v. Harris*, 3 N. Y. S. O. R., 433; *E. R. Bk. v. Butterworth*, 30 How., 444.)

*L. L. Bundy* for the respondent. The note in suit was not joint. (*Brownell v. Winnie*, 29 N. Y., 400; *Cobb v. Titus*, 10 id., 198.) It was proper to show, by parol proof, the circumstances under which defendant signed the note. (*Artcher v. Douglass*, 5 Den., 509; *Paine v. Packard*, 13 J. R., 173; *King v. Baldwin*, 17 id., 384; *Gahn v. Neimcewicz*, 3 Paige, 614; 11 Wend., 312; *Barry v. Ransom*, 12 N. Y., 462; *Chester v. Bk. of Kingston*, 16 id., 343; *Mason v. Lord*, 40 id., 489; *Thomas v. Truscott*, 53 Barb., 204, 205; *Dobson v. Pierce*, 12 N. Y., 156; *Despard v. Walbridge*, 15 id., 374, 378; *McBurney v. Wellman*, 42 Barb., 390; *Tibbs v. Morris*, 44 id., 138; *Van Pelt v. Astor*, 2 Swe., 202; *Hodges v. Tenn. Ins. Co.*, 8 N. Y., 416; *Barrett v. Carter*, 3 Lans., 68; *Grafton Bk. v. Kent*, 4 N. H., 221; 2 C. & H. Notes, 1466; *Ward v. Stout*, 32 Ill., 399; *Benjamin v. Arnold*, 5 T. & C., 55.) Extending the time of payment to a principal debtor without the consent of the surety discharges the latter. (*Reynolds v. Weed*, 5 Wend., 501; 3 Paige, 613; 11 Wend., 312; *Newman v. Finch*, 25 Barb., 173; *Hart v. Hudson*, 6 Duer, 294; *Grant v. Smith*, 46 N. Y., 97; *Bangs v. Strong*, 10 Paige, 11; 7 Hill, 250; *Ludlow v. Simond*, 2 Cai. Cas., 57; *Fox v. Parker*, 44 Barb., 541; Story's Eq., §§ 325, 326; *Miller v. McCann*, 7 Paige, 157; *Rathbone v. Warren*, 10 J. R., 581; 17 id., 384; 13 id., 174; 25 N. Y., 479; *Rees v. Barrington*, 2 Ves., Jr., 540; *Belington v. Wagoner*, 33 N. Y., 32; *Chester v. Kingston Bk.*, 16 id., 336; *Burgett v. Elles*, 45 id., 111; *Hubby v. Brown*, 16 J. R., 70; *Boyd v. McDonough*, 39 How., 389.) The giving of the first bank note to plaintiff was an extension of time which discharged defendant. (*Fellows v. Prentiss*, 3 Den., 512; *Putnam v. Lewis*, 8 J. R., 389; *Kitty v. Jenkins*, 1 Holt, 73, 74; *Dorlon v. Christie*, 39 Barb., 614; *Elwood v. Dieffendorf*, 5 id., 398; *Hubbard v. Carpenter*,

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id., 520; *Myers v. Wells*, 5 Hill, 463; *Bangs v. Mosher*, 23 Barb., 478; *Place v. McIlvain*, 38 N. Y., 96; *Thurber v. Corbin*, 51 Barb., 215; *Howe v. Buff., etc., R. R. Co.*, 37 N. Y., 297; *Andrews v. Massett*, 58 Me., 539.) The giving of the first bank note amounted to a payment of the note in suit. (*Fisher v. Maiom*, 47 Barb., 159; *Rice v. Dewey*, 54 id., 457; *Smith v. Miller*, 43 N. Y., 171; *Dayton v. Trull*, 23 Wend., 345; *Huston v. Weber*, 3 T. & C., 147.)

CHURCH, Ch. J. The first question presented is, whether it is competent for one of two makers of a promissory note to prove *by parol* that he signed the note as surety for the purpose of enabling him to interpose a defence, that he was discharged by an extension of time given to the principal debtor, with knowledge of the suretyship.

Recently in the Supreme Court it has been expressly decided in *Campbell v. Tate* (7 Lans., 370), that such evidence was incompetent, and this decision was followed in *Benjamin v. Arnold* (5 N. Y. S. C. R. [T. & C.], 54).

The question is of great practical importance and frequently arises, and there should be no delay in having a final adjudication upon it by this court. The ground of the objection is that such evidence tends to vary the terms or legal effect of the written instrument. It must be confessed that there is some confusion in the authorities upon the subject, but an examination of them shows that it is caused by doubts entertained by some of the courts in England and in this country, first, whether a defence of this character could be set up in a court of law, and when that point was yielded, whether parol evidence of suretyship was competent in a court of law for the purpose of establishing the defence. These points troubled the courts in this State at an early day. In *The People v. Jansen* (7 J. R., 331), the fact of suretyship appeared and was admitted, and the court while adjudging that the rule for discharging a surety was the same at law as in equity, queried whether the fact of suretyship could be proved in a court of law. But in *King v. Baldwin* (17 J. R., 384),

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SPENCER, Ch. J., in dissenting from the opinion of Lord LOUGHBOROUGH, in *Rees v. Berrington* (2 Ves., Jr., 542), that when the form of the security bound the principal and surety jointly and severally, the security could not aver that he is only bound as surety, except in equity, said: "Now we could not assent to his lordship's proposition that the fact of a man's being bound as security could not be averred at law if it becomes material to a legal inquiry, for we understand the rules of evidence to be the same in both courts." At a later day, in *Artcher v. Douglass* (5 Den., 509), BEARDSLEY, J., while unable to find in the decisions any valid reason for not receiving the evidence at law, as well as in equity, hesitated in deciding that there was no reason. He said: "The fact when ascertained, if sufficient in equity, is equally valid as a legal defence. The doubt is as to the reception of parol evidence to prove the fact in a court of law." So in New Jersey, in *Pintard v. Davis* (1 Zab., 632), there were two opinions; one maintaining that such evidence could not be admitted in a court of law, and the other expressed doubts whether it might not, but maintained that the facts alleged in that case did not constitute a defence either at law or equity. There never has been any dispute that such evidence was admissible in a court of equity. (3 Paige, 614; 12 N. Y., 465; 2 Am. Leading Cases [5th ed.], 443, 456.) Under the Code (section 150), equitable defences are permitted in actions at law, and this would seem to obviate the difficulty supposed previously to exist, both in setting up the defence and in receiving any evidence which in a court of equity is admissible to sustain it. This was so held in England, where the admissibility of such evidence in a court of law has been regarded at times with disfavor, in the case of *Greenough v. McClelland* (105 Eng. C. L., 428), under a statute authorizing equitable defences in actions at law. (7 Ellis and Bl., 431.) Whatever might have been the distinction between such evidence at law and in equity under the old system (and I have examined in vain to find any good reason for the distinction), there can be none in courts of both legal and

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equitable cognizance, and in respect to evidence to sustain a defence expressly permitted in actions at law. The general rules of evidence are the same at law as in equity, and it is no more competent to vary the terms of a written instrument by *parol* evidence in equitable actions than in those strictly legal, unless in exceptional cases for the purpose of maintaining an action or defence under some recognized head of equitable jurisdiction. The confusion and apparent conflict in the authorities must, I think, have originated in the idea that defences of this character were equitable in their nature, and could only be available in a court of equity. When it was conceded that they were equally available in a court of law, it is difficult to find a reason for excluding the same evidence at law that is admissible in equity. However this may be, and without invoking any equitable rule, a conclusive answer to the objection to this evidence in any court, in my opinion is, that it does not tend to alter or vary either the terms or legal effect of the written instrument. The contract was in all respects the same, whether the defendant was principal or surety. In either case, it was an absolute promise to pay \$1,000 one day after date, nothing more and nothing less. There is neither condition nor contingency. It would have been precisely the same contract if the defendant had added the word "surety" to his name. The addition of that word would not have varied it in the slightest degree. The only service it would have performed would have been to give notice to the other party of the fact. If this is shown *aliunde*, it is equally effective. There is nothing inconsistent in the instrument with the fact that the defendant signed as surety, as in 10 Peters, 263, where the sureties bound themselves in terms as principals. The fact is collateral to the contract proving simply the relation of the parties. It is an extrinsic circumstance, not affecting the contract made, but which operates, when knowledge of it is brought home to the creditor, to prevent him from changing the contract or making a different one with the principal debtor, without the consent of the surety, or from releasing any security held for the payment

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of the debt, and imposes the duty of enforcing the contract, when due, upon request of the surety. The right to do these acts or omit to perform such duty, in no legal sense, belongs to or is included within the terms or legal effect of the contract. The prohibition results from the relation of the parties. Nor is there any hardship upon the creditor in this rule. If the word "surety" had been added to the name of the defendant, it is conceded that the defence sought to be interposed would be available in any court; and yet that word, as we have seen, would not affect the contract. The fact proved by extrinsic evidence and that the creditor had knowledge of it, is as potent as if added to the name of the surety; and it is potent, not in varying the contract, but in imposing certain duties and obligations upon the creditor in his subsequent dealings with the principal debtor in respect to the contract. These views appear to me to be palpably correct upon general principles, and they are sustained by a decided weight of authority, and, if the distinction between the different courts is ignored, as I think it should be, by a uniform current of authority.

*Pain v. Packard* (13 J. R., 173) was a demurrer to a plea alleging that the defendant signed the note as surety and had requested the creditor to prosecute, which he had omitted to do, and that the principal debtor had become insolvent. The court overruled the demurrer and held the defence good. It is evident that the fact that defendant was surety did not appear upon the note. The court say that "the averments and facts stated in the plea are not repugnant or contradictory to the terms of the note." *King v. Baldwin* (17 J. R., 384, *supra*) was a suit in equity for relief, by a surety, after the defence had been rejected at law. The defence was sustained in the Court of Errors, reversing the chancellor's decree (2 J. Ch., 554) by the casting vote of the lieutenant-governor. There were two points of controversy: First, whether the defence was available at law; and, second, whether the facts, viz., a request and neglect to prosecute, and insolvency, constituted a defence. The opinion of

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SPENCER, Ch. J., which was for reversal, maintained that the facts established a good defence, and approved the decision in *Pain v. Packard*, and sustained the equitable jurisdiction, not because the defence was not available at law, but for the reason that the question had been regarded as doubtful, and the defence had been excluded. PRATT, J., who had agreed to the decision in *Pain v. Packard*, in the Supreme Court, expressed dissatisfaction with it on the ground that the facts did not constitute a defence. VAN VECHTEN, senator, was of the opinion that the facts did not constitute a defence, and if they did it was available at law. Since that time it has been established by this court that the facts developed in that case would discharge a surety. In *Artcher v. Douglass* (5 Den., 509) it was decided that obligors in a bond to the sheriff, to indemnify him for seizing certain property, at the suit of one V., might show by parol that they were sureties for V., for the purpose of claiming that a release of him discharged them. The decision was placed upon the ground that the principal debtor did not join in the bond; but how that circumstance could affect the question of varying the written instrument by parol evidence is not apparent. In *Barry v. Ransom* (12 N. Y., 462), DENIO, J., stated that such evidence was admissible, and, although not strictly necessary to the decision of that case, it shows how an able and experienced judge understood the rule to be. The authorities in this State are not numerous nor very decisive, but they tend to sustain the admissibility of such evidence; and I feel warranted in saying that such was generally understood to be the rule by the courts and the profession. In some of the other States the decisions have been more explicit. In *Harris v. Brooks* (21 Pick., 195) SHAW, Ch. J., says: "So, when one of two promissors annexes the word "principal" to his signature and the other "surety," these descriptions do not affect the terms or legal effect of the contract. \* \* \* They indicate the relation in which parties stand to each other and notice of such relation to the holder, but the fact of such relation and notice of it to the holder may, we think, be proved by



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extrinsic evidence. It is not to affect the terms of the contract, but to prove a collateral fact and rebut a presumption. }

In *The Bank of Steubenville v. Hoge* (6 Ohio, 17) the court say: "The defence sets up a distinct and independent fact beyond the terms of the writing, not controverting any of its stipulations."

In *Davis v. Barrington* (30 N. H., 517) the court, in speaking of the admissibility of such evidence, say: "It was not offered to vary or change the terms of the contract in Davis' bond, or to weaken its force, or to explain it in order to change its legal effect or interpretation, or to limit its scope and extent. The purpose was to show a collateral fact." There are numerous other authorities to the same effect, among which are: 4 New Hampshire, 221; 28 Maine, 280; 34 id., 547; 25 Vermont, 450; 9 Alabama, 949; 18 Pennsylvania State Reports, 207; 40 Indiana, 204. It is said in *Benjamin v. Arnold* (*supra*) that the question is an open one in England, but I have deemed it unnecessary to refer to the authorities. Those relied upon as adverse usually turn upon the distinction between legal and equitable rules and defences, and have no weight upon the question as presented to this court. I can see no reason, either in principle or on authority, for not receiving parol evidence of the fact of suretyship in any court when it is material for the purpose of establishing a cause of action or defence. It is proper to add that the learned judge who delivered the opinion in 7 Lansing (*supra*), and who is now a member of this court, acquiesces in overruling that decision.

The remaining question is, whether the judge was justified in holding that the facts proved discharged the defendant, and this depends upon the question whether there was a valid agreement with the principal debtor to extend the time.

The principle is well settled that where the holder of a promissory note takes a new note from the debtor, payable at a future day, he suspends the right of action upon the original demand until the maturity of the last mentioned note, and the surety upon the same not assenting thereto, thereby



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becomes discharged from liability. (*Fellows v. Prentiss*, 3 Den., 512; *Bangs v. Mosher*, 23 Barb., 478; *Dorlon v. Christie*, 39 id., 610; *Albany City Ins. Co. v. Devendorf*, 43 id., 444; *Place v. McIlvain*, 38 N. Y., 96.)

To establish a case, however, within the rule laid down, it is essential that it should be made to appear that there was an agreement, either express or implied, from the facts proved, that the new note was taken in payment of the first note, or that the time of payment of the latter was extended in favor of the party who was primarily liable. The proof in this case shows that the original loan for which the note in suit was given was made to the principal for a short period, and the plaintiff desiring the money, a new note was given by the principal debtor, payable at thirty days, and indorsed by the plaintiff, upon which the money was obtained and paid to the plaintiff. When this note became due a small payment was made and a new note given for thirty days, upon which \$200 was afterwards paid, leaving a balance of \$700 unpaid. It is quite obvious that here was an implied agreement by which the time of payment of the original note was extended, and this being done without the knowledge or assent of the defendant, who was a surety, his rights were thereby affected. If the plaintiff had prosecuted and sought to enforce the collection of the old note before either of the other notes became due, it would have been a valid defence that he had received his money, that the time of payment had become extended, and that he was not in a position to maintain an action which would be practically demanding double payment. There was no agreement between the plaintiff and the principal debtor that the new note was only taken as collateral to the old one, or that the latter was to be retained as security for the new note, and the fact that the original note was not surrendered does not change the legal effect or real character of the contract to be implied from the transaction. No such surrender was required to be made to render the contract extending the time valid and effective, as will be seen by an examination of the reported cases. (See cases already cited,

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*supra* ; also, *Hart v. Hudson*, 6 Duer, 304; *Myers v. Welles*, 5 Hill, 465.) Nor was there any want of consideration for such a contract as the raising of the money upon the new note, and the receipt thereof by the plaintiff was quite sufficient for that purpose.

The counsel for the appellant has called our attention to some decisions as authority for the position that the sureties are not discharged by an arrangement of the character of that which is established by the testimony here, but none of them are applicable to the case now considered. *Halliday v. Hart* (30 N. Y., 474) holds that the performance of an unqualified legal obligation, by the payment of part of the amount due upon a promissory note, is not a valid consideration for the extension of payment of the remainder, so as to discharge the sureties. The principle there decided has no application to a case where a note has been given for another already due, and the time of payment thereby extended.

In *Gahn v. Niemcewicz* (11 Wend., 312) there was a want of consideration and no valid extension of the time of payment. In *Cary v. White* (52 N. Y., 138) Judge ALLEN criticises the cases which hold that the taking of a collateral security on time is an extension of the time of payment, and suspends the right of action until the collateral security becomes due. The remarks made must be referred to the facts of that case, and are not controlling in a case where the security was not received as collateral, and the money realized upon the new note was paid to the creditor, and a direct application made of the proceeds for his benefit.

The judgment must be affirmed.

All concur; MILLER, J., concurs in result.

Judgment affirmed.

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## CORNELIA VAN ALLEN, Respondent, v. THE FARMERS' JOINT STOCK INSURANCE COMPANY, Appellant.

A policy of fire insurance contained a condition requiring proofs of loss to be furnished by the insured within twenty days. It also contained a clause, in substance, that nothing save an agreement in writing, signed by an officer of the company, should be considered as a waiver of any condition or restriction in the policy. In an action upon the policy, *held*, that a local agent had no authority to waive such condition.

*Van Allen v. F. J. S. Ins. Co.* (4 Hun, 413) reversed.

(Submitted February 25, 1876; decided March 21, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department in favor of plaintiff, entered upon an order denying motion for a new trial and directing judgment on a verdict. (Reported below, 4 Hun, 413.)

This action was upon a policy of fire insurance.

One of the conditions of the policy was as follows: "All persons insured by this company and sustaining loss or damage by fire shall forthwith give the company notice thereof in writing, and within twenty days after the loss shall deliver a particular account of such loss, signed and sworn to by them, stating the ownership of the property insured, whether any, and what other insurance existed on the same property, the whole cash value of each building or article destroyed or damaged, separately, with the amount of damage to the same and their interest therein."

The policy contained this clause: "The use of general terms or any thing less than a distinct, specific agreement, clearly expressed in writing and signed by an officer of the company, shall not be construed as a waiver of any written or printed condition or restriction of this policy."

A loss having occurred, plaintiff failed to furnish the proofs of loss required within the twenty days. Evidence was given upon the trial of statements made by Hiram Willetts,

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a local agent of plaintiff's, which were claimed by plaintiff to amount to a waiver of such proofs. The court charged, in substance, that Willetts had the right to waive said condition, to which defendant's counsel duly excepted.

Exceptions were ordered to be heard at first instance at General Term.

*D. Pratt* for the appellant. The local agent had no authority to waive the condition in the policy as to service of proofs of loss. (*Stringham v. St. Nicholas Ins. Co.*, 3 Keyes, 280; *Bush v. Westchester F. Ins. Co.*, 63 N. Y., 531; *Wall v. Home Ins. Co.*, 8 Bosw., 597; *Wilson v. Gen. Mut. Ins. Co.*, 14 N. Y., 418; *Dawes v. N. R. Ins. Co.*, 7 Cow., 462; *Boughton v. Am. Mut. L. Ins. Co.*, 25 Conn., 542; Story on Ag., § 126; Smith's Merc. Law, 50; *Underwood v. F. J. S. Ins. Co.*, 57 N. Y., 504; *Ripley v. Aetna Ins. Co.*, 30 id., 136.) The court erred in charging that the jury could decide the waiver on Willett's and Peak's evidence, and in refusing to charge that under the policy there could be no waiver by parol. (*Parker v. Arctic Ins. Co.*, 1 N. Y. S. C. R., 397; 59 N. Y., 1.)

*M. Hopkins* for the respondent. There was no error in the charge of the judge. (*Parker v. Arctic Ins. Co.*, 1 N. Y. S. C. R., 397; 59 N. Y., 1; *Bodine v. Ex. F. Ins. Co.*, 51 id., 122; *Kendall v. Hol. Pur. Ins. Co.*, 2 N. Y. S. C. R., 375; *Underwood v. F. J. S. Ins. Co.*, 57 N. Y., 500; *Ames v. N. Y. U. Ins. Co.*, 14 id., 253; *Mayor, etc., v. Ham. F. Ins. Co.*, 39 id., 46; *Rowley v. Emp. Ins. Co.*, 3 Keyes, 560; *Whitwell v. Put. F. Ins. Co.*, 6 Lans., 166; *Pitney v. Glens F. Ins. Co.*, 61 Barb., 335; *Idé v. Phœnix Ins. Co.*, 2 Bliss [U. S.], 333; *Gail v. Nat. Pro. Ins. Co.*, 25 Barb., 189.)

*Per Curiam*. We think that the charge of the judge that Willetts had a right to waive the provision in the policy requiring the plaintiff to furnish the proofs of loss, was erro-

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neous; and for this reason the judgment must be reversed, and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

WILLIAM B. FAIRCHILD et al., Appellants, v. EGBERT H. FAIRCHILD et al., Respondents.

Real estate purchased for and appropriated to partnership purposes and paid for out of partnership funds is partnership property, although the legal title is taken in the name of one of the partners; equity will hold him as trustee for the firm.

There is no distinction in respect to the proof necessary to establish the fact that the real estate is partnership property between such a case and the case of a conveyance to the several partners; it may be established in either case by parol evidence.

The fact that in the firm accounts the land is treated the same as other firm property as to purchase-money, income, expenses, etc., is a controlling circumstance in determining the intent, and from it an agreement may be inferred.

For the purpose of paying debts and adjusting the equities between the copartners real estate belonging to a partnership is treated as personal property, and what remains is regarded as real estate descending to the heirs of the partners, according to their several interests.

The same evidence, however, which will establish its character as partnership property for the purpose of paying the debts and adjusting the equities, will determine it for the purpose of final division.

Real estate so purchased is not within the provision of the statute of uses and trusts (1 R. S., 728, § 51), providing that when a grant for a valuable consideration shall be made to one person and the consideration paid by another, no use or trust shall result in favor of the person making the payment. The partner having title is a trustee for the firm, holding the property as personalty; and when this trust is discharged by the payment of the debts and the settlement of the claims of the partners as between themselves, a trust in the remainder result, by operation of law to the other members of the firm and the heirs of such as have died, which is validated by the provision of the said statute (§ 50) preserving trusts arising or resulting by implication of law.

Where it appears that a partner who has taken title in his own name to real estate claimed to belong to the firm has access to the books which

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were kept by clerks, that he examined them at times and had personal supervision of the office, it is to be presumed that he knew how the entries were made, and they are competent evidence against him.

*It seems* that, as a general rule, where members of a firm have access to its books, and opportunity to know how their accounts are kept, such knowledge on their part will be presumed.

In order to establish payment of money out of partnership funds upon claims against real estate so deeded to one of the members, evidence that mortgages have been so paid is competent without production of the mortgages; they are to be regarded simply as collateral to the principal fact.

(Argued March 21, 1876; decided March 28, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment entered upon a decision of the court at Special Term. (Reported below, 5 Hun, 407.)

The nature of the action and the facts are sufficiently stated in the opinion.

*Edward C. James* for the appellants. It was error to receive in evidence the compendium of entries in the books of Fairchild, Walker & Co., which it was claimed related to the property in question, and to receive evidence to explain the same. (*Baker v. Stackpoole*, 9 Cow., 420, 433; 2 R. S., 135, § 6; Laws 1860, chap. 322; *Cook v. Barr*, 44 N. Y., 156; *Taylor v. Herring*, 10 Bosw., 447, 456-457; *Steere v. Steere*, 5 J. Ch., 1; *Cripp v. Fee*, 4 Bro. Ch., 472; *Morton v. Teevart*, 2 T. & C., 66, 77.) There was no competent evidence of any agreement between the partners to make this purchase. (*Forsyth v. Clark*, 3 Wend., 637, 645, 651.) Evidence of what occurred at the auction was incompetent. (2 R. S., 136, § 4; *McComb v. Wright*, 4 J. Ch., 659; *First Bap. Ch. v. Bigelow*, 16 Wend., 28.) The evidence as to improvements was incompetent and immaterial. (*Rogers v. Murray*, 3 Paige, 390, 398; *Bottsford v. Burr*, 2 J. Ch., 405, 515.) Defendants could not testify directly that they did not read over the deed when given, or examine it and pronounce it right, or indirectly that they never read it and

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did not know its contents, the grantee being dead. (Code, § 399; *Clark v. Smith*, 46 Barb., 30; *Dyer v. Dyer*, 48 id., 190; *Stanley v. Whitney*, 47 id., 586, 588; *Grey v. Grey*, 47 N. Y., 553, 554.) Copartnership interest in real estate rests wholly upon an agreement between the partners that it shall be assets, even when it was bought with copartnership funds and used for copartnership purposes. (*Hiscock v. Phelps*, 49 N. Y., 97; *Thompson v. Bowman*, 6 Wall., 316; 1 R. S., 727, § 44; *Collumb v. Reed*, 24 N. Y., 505; *Buchan v. Sumner*, 2 Barb. Ch., 165; Parsons on Part., 363, 366; *Cox v. McBurney*, 2 Sandf. [S. C.], 561; *Coles v. Coles*, 15 J. R., 159; *Smith v. Jackson*, 2 Edm. Ch., 28, 32; *Forsyth v. Clark*, 3 Wend., 367.) An agreement which converts real estate conveyed to one partner into assets of the firm cannot be proved by parol. (*Bottsford v. Burr*, 2 J. Ch., 405, 415; *Bartlett v. Pickersgill*, 1 Edm., 515; *Lathrop v. Hoyt*, 7 Barb., 59, 62, 63; *Smith v. Burnham*, 3 Sumn., 435; *Levy v. Brush*, 45 N. Y., 589; *Hale v. Henrie*, 2 Watts, 144.) Parol evidence of a partnership in lands is not admissible for the purpose of establishing the interests of the partners as between themselves. (3 Sumn., 435; *Henderson v. Hudson*, 1 Mump., 510; *In re Warren*, Davies, 323; *Hale v. Henrie*, 2 Watts, 144; *Ridgway's Appeal*, 15 Penn., 177; *Pitts v. Waugh*, 4 Mass., 424; *Caddick v. Skidmore*, 2 DeG. & J., 52; Story on Part., § 83; *Chester v. Dickinson*, 45 How., 326; *Dale v. Hamilton*, 5 Hare, 369; 54 N. Y., 1; 2 Phil., 266, 274; *Essex v. Essex*, 20 Beav., 442; *Bunnell v. Taintor*, 4 Conn., 568; *Levy v. Brush*, 1 Swe., 653; *Thompson v. Bowman*, 6 Wal., 316.) There is no trust arising or resulting by implication or construction of law. (*Leman v. Whitley*, 4 Rus., 423, 426; *Smith v. Burnham*, 3 Sumn., 435, 463; *White v. Carpenter*, 2 Paige, 241, 265; *Wray v. Steele*, 2 V. & B., 388, 390; Perry on Trusts, § 132.)

Wm. F. Shepard, L. Hasbrouck, Jr., and Flamen B. Candler for the respondents. The taking of the deed in the name of Fairchild, under the circumstances, vested in him

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Opinion of the Court, per CHURCH, Ch. J.

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a resulting trust for the benefit of the firm. (*Freeman v. Kelly*, 1 Hoffm., 90, 97; *Bartlett v. Pickersgill*, 1 Edm., 515; *Wray v. Steele*, 2 V. & B., 388; *Lounsbury v. Purdy*, 18 N. Y., 515, 519; *Footte v. Bryant*, 47 id., 551; *Sierman v. Schurck*, 29 id., 508; *Day v. Roth*, 18 id., 448; *Grant v. Morse*, 22 id., 323; *Gilbert v. Gilbert*, 2 Abb. Ct. of App. Dec., 256; *Hosford v. Merwin*, 5 Barb., 58; *Chester v. Dickinson*, 52 id., 362; 54 N. Y., 1; *Van Brunt v. Applegate*, 44 id., 548-550.) The partners are joint tenants. (Col. on Part., § 123.) As to creditors of the firm this property is to be treated as partnership assets. (Pars. on Part., 363-366; Col. on Part. [Perkins' ed.], § 135; *Collumb v. Read*, 24 N. Y., 505; 49 id., 97; 5 Barb., 51-58; 44 N. Y., 544, 549; 54 id., 1.) The facts out of which a resulting trust may arise may be proved by parol. (*Reid v. French*, 11 Barb., 407; *Footte v. Bryant*, 47 N. Y., 551.) The testimony of E. H. Fairchild in regard to the conversation between his father, Walker and Coleman was competent. (*Lobdell v. Lobdell*, 36 N. Y., 327, 333; *Cary v. White*, 59 id., 336.)

CHURCH, Ch. J. This is an action for partition among the heirs of Egbert N. Fairchild, of forty-eight vacant lots in the city of New York.

Egbert N. Fairchild, Stephen C. Walker, Isaac D. Coleman and Henry J. Brown, were copartners, and constructed the new reservoir in Central park, and also other public works. The copartnership was formed in 1858, and the lots in question were purchased in 1860, and a conveyance taken in the name of Fairchild only. The other copartners, including the widow and heirs of one of them who has since died, claim an interest in the property equal to their respective interests in the copartnership. The rights of creditors are not involved.

The judge who tried the case at Special Term found that the property was purchased by and for the benefit of the copartnership, and paid for with its funds, that taxes and incumbrances were also paid from such funds, and that it was



intended and understood by all the members of the firm that said property belonged to the firm assets, and all payments, expenses, etc., were kept upon the firm books. He further found that the other members of the firm consented, that Fairchild should take title for the firm, but that they did not consent that he should take the title absolute in his own name, without recognition of their interests, and they did not know that the deed was so taken.

If these findings are sustained by sufficient legal evidence, the legal conclusion arrived at by the learned judge is inevitable, viz.: That the other members of the firm are entitled to an interest in said property, according to their interest in the partnership. I do not understand that this general proposition is seriously disputed by the counsel for the plaintiffs, but he predicates his answer to the claim, first, upon the incompetency of the evidence admitted, and second, upon its insufficiency.

The fifty-first section of the statute of uses and trusts, provides that when a grant for a valuable consideration shall be made to one person, and the consideration paid by another, no use or trust shall result in favor of the person making the payment, but the title shall vest in the alienee, subject to the rights of creditors, as provided in section 52. The fifty-third section contains an exception in favor of the person paying the consideration, when an absolute conveyance is taken in the name of another without his consent or knowledge.

The Special Term decided in favor of the defendants upon two grounds: First, that a trust resulted to the defendants by the payment of the consideration, and that they could invoke the benefit of the exception contained in section 53; and, second, that the property was copartnership property, and should be treated as such, although the title was held by one member of the firm. It is insisted on behalf of the plaintiffs, that the admissions in the answer prevent the defendants from availing themselves of the exception contained in the fifty-third section. These admissions are: "That the conveyance was taken to and in the name of

Egbert N. Fairchild, for the purpose and convenience of the partnership, to the end that it might be more easily handled and pledged and disposed of for said copartnership purposes than if it stood in the individual names of all the members of said firm."

It cannot be disputed that this allegation is a distinct admission that the defendants knew that Fairchild was to take the title not only, but so take it as to be able to pledge and dispose of it in his own name, but it is not absolutely inconsistent with his taking it in a way to recognize their rights. It would probably have been sufficient for this purpose to have inserted a declaration that he took the title for the benefit of the firm, and that the property was partnership property in pursuance of an agreement between the members of the firm. Assuming the necessity of some such recognition in order to secure the interest of the other members of the firm, it may be presumed that they contemplated it, and hence that the failure to thus take it was a fraud upon them.

Upon the findings in the case, the authorities go far towards sustaining the decision upon this ground. (*Day v. Roth*, 18 N. Y., 448; *Lounsbury v. Purdy*, 18 id., 515; *Siemon v. Schurck*, 29 id., 598; *Footte v. Bryant*, 47 id., 544.) Parties are bound by the allegations in their pleadings, and by every reasonable intendment to be inferred therefrom, and it is, to say the least, a liberal construction in favor of the defendants, to hold that the statement in the answer, that the lots were conveyed to Fairchild for the purpose of pledging and disposition, is not an admission that they were conveyed precisely as the parties intended, especially in the absence of any intimation they were not. The tendency of the decisions is to sustain the equitable interests of parties in such transactions, whenever it can be done without a palpable violation of the statute, and following this tendency it may perhaps be held that the defendants are not concluded by their answer. But looking at the real nature of the transaction as found by the judge, it seems to me more reasonable to hold that this property should be regarded as assets of the copartnership.

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Opinion of the Court, per CHURCH, Ch. J.

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The findings are explicit, that it was purchased and paid for by the firm as partnership property, and always treated as its property in the payment of taxes and incumbrances, making improvements, etc. Real estate purchased for partnership purposes and appropriated to those purposes, and paid for by partnership funds, becomes partnership property, and it is not material in what manner or by what agency the land is purchased, or in what name it stands. If it be established that it belongs to the partnership, equity will hold the one in whom is the legal title as trustee for the partnership. (Parsons on Partnership, 363.) When the land is conveyed to the several partners it is not indispensable that it should be actually used for partnership purposes, nor that a positive agreement should be proved making it partnership property. If it has been paid for with partnership effects it is then a question of intention, whether the conveyance is to have its legal effect, and the parties are to be treated as tenants in common, or whether the land is to be treated as partnership property. The manner in which the accounts are kept, whether the purchase-money was severally charged to the members of the firm, or whether the accounts treat it the same as other firm property, as to purchase-money, income, expenses, etc., are controlling circumstances in determining such intention, and from these circumstances an agreement may be inferred. (24 N. Y., 511.)

The rule, I apprehend, is the same in this respect when the deed is made in the individual name of one of the partners, as where it is made in the names of all the members of the firm. But a distinction is claimed to exist between creditors and the members of the firm, and between the members themselves in respect to the proof necessary to establish the fact that the real estate is partnership property. I do not think such a distinction is recognized by the authorities. In this country, real estate belonging to a partnership, for the purpose of paying the debts and adjusting the equities between the members of the firm, is treated as personal property; and what remains is considered and treated as real

estate, which would go to the heirs of the partners according to their interests. This conclusion was reached by the chancellor in an elaborate opinion in *Buchan v. Sumner* (2 Barb. Ch., 165–200), reviewing all the American authorities; and was approved and adopted by this court in *Collumb v. Read* (24 N. Y., 505). The English rule gives to the real estate of a partnership the character and qualities of personal property as to all persons; and the remainder, after paying debts and adjusting the equities of the partners, goes to the personal representatives, and not to the heir, probably on account of the great injustice which would result by the laws of inheritance in England. (24 N. Y., 505; Parsons on Partnership, 370.) But the American rule, that the remainder descends to the heir, does not affect the character of the property as partnership effects, except that the incidents and qualities of real estate are revived. It is divided as so much money capital would be, but it resumes its original qualities. (Id., 385.) The same evidence, however, which would make it partnership property for the purpose of paying debts and adjusting the equities between the copartners would establish it for the purpose of final division. It would be incongruous to say that evidence which would be sufficient to establish that it was partnership property for the former purposes would fail for the latter purpose, and I can find no authority for such a distinction. Such a rule, while compelling one member of a firm holding the legal title as trustee for the partnership, to account and disgorge to the extent of making the accounts equal between the members of the firm, when that was accomplished, would enable him to rob his associates by pocketing the remainder.

A different question has been very much controverted both in this country and in England, and that is, whether a partnership or agreement between two or more persons to purchase lands can be proved, by parol, within the statute of frauds. The counsel for the plaintiffs contends that this question is involved in this case, and cited the case of *Smith v. Burnham* (3 Sum., 435) as an authority against the com-

petency of such evidence. It does so hold in an elaborate opinion by STORY, J. The correctness of this decision has been disputed by the Commission of Appeals, in *Chester v. Dickerson* (54 N. Y., 1), which, if necessary, we should probably feel bound to follow. But I do not think that question is involved here.

Proof of a partnership for the purpose of buying and selling lands, presents a different question from that which arises when an existing partnership purchases land for its use or benefit; and STORY, J., in delivering the opinion in *Smith v. Burnham* (*supra*), recognizes the distinction; he says: "It is not the case of a purchase confessedly paid out of the funds of an existing partnership for partnership purposes, and the deed taken in the name of one partner." In the latter case he concedes that a resulting trust would arise, while in the former he held that it would not; the difference being that in the former the trust results from the payment of the consideration, while in the latter it arises entirely from the contract.

Real estate purchased as partnership property is not within the prohibition of the statute. In the first place, it is not the case where the consideration is paid by one person and a conveyance taken in the name of another. The consideration is paid by all. It is not, therefore, within the letter of the statute. But a more substantial reason is, that property thus held is regarded as personal property, for the purpose of paying debts and adjusting the equities between the partners; and the individual member holding the legal title is a trustee for the partnership in respect to the property as personalty; and when the debts are paid and the claims of the several members as between themselves paid, the trust for partnership is discharged and a trust results to the other members of the firm, and the heirs of such as have died, in the remainder, by operation of law, which is saved by section 50 of the statute, and the holder of the legal title then becomes a trustee of such remainder, as real estate for the benefit of persons interested. Such a trust is not prohibited,

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nor is it necessary for parties claiming the benefit of it to bring themselves within the exception in section 53. (*Lloyd v. Spillet*, 2 Atk., 150; 44 N. Y., 544, and cases before cited.)

It remains to consider the exceptions to the admission of evidence, and to the sufficiency of the evidence, to establish the facts found. Some of these objections are necessarily disposed of by the views before expressed. The point was taken that the entries in the firm books were incompetent, because made by the book-keeper, without affirmative proof that Fairchild saw them. It was proved that Fairchild had access to the books, and sometimes examined them, and had personal supervision of the office where the books were kept, and I infer had the financial management of the firm. From these circumstances it is properly inferable that he knew how the entries were made, and it is sufficient if they were competent. As a general rule, where members of a firm have access to the books, and opportunity to know how their accounts are kept, the presumption is that they do know.

It was proved that mortgages upon the lands were paid by the funds of the firm — by checks of the firm — and it was objected that the mortgages and checks should have been produced. As to the checks, there was evidence tending to show that they had been burned, and I do not think it was strictly necessary to produce the mortgages. The material fact was the payment of money out of partnership funds upon claims against the real estate. The mortgages appeared in the accounts of the firm, and the payment of them, while it strengthened the evidence that the land was paid for by the firm, was not absolutely necessary for that purpose. The mortgages may be regarded as collateral to the principal fact, and not necessary to be produced.\*

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\*The omitted portion of the opinion is taken up with the discussion and determination of questions presented by exceptions to the reception of evidence, not deemed of sufficient general importance to require publication.

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Statement of case.

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It may be said, in respect to the exceptions to the admissibility of evidence, that the objections are very numerous, and nearly all of them general. The ground evidently taken by the learned counsel for the plaintiffs was, that it was incompetent to vary or alter the legal effect of the conveyance to Fairchild by parol evidence. As this general ground is not tenable, and as the principal and controlling facts were proved by competent evidence, an appellate court will not be critical to discover technical errors where no rule of law has been clearly violated, and it is evident that no injustice has been done.

The evidence produced, assuming its competency to sustain the finding that this was in fact partnership property, is ample for that purpose. No other conclusion could be arrived at from the evidence.

The defendants Beach and Barrowe, not having appealed from the judgment of the General Term, it is improper to review the point involved under the assignment from Mrs. Schreiner.

The judgment of the General Term must be affirmed.

All concur.

Judgment affirmed

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THE PEOPLE ex rel. TIMOTHY F. DONOVAN, Plaintiffs in Error, v. WILLIAM C. CONNER, Sheriff, etc., Defendant in Error.

An order quashing a writ of *habeas corpus* can only be reviewed upon appeal. A writ of error will not lie in such case.

(Argued March 28, 1876; decided April 4, 1876.)

ERROR to the General Term of the Supreme Court in the first judicial department to review order affirming an order of Special Term quashing and dismissing a writ of *habeas corpus*.

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Opinion of the Court, per *Curiam*.

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*T. F. Donovan* for the relator, in person.

*H. Edwin Tremain* for the respondent. A writ of error will not lie in this case. (*Sudlow v. Knox*, 7 Abb. Pr. [N. S.], 411; Code, §§ 323, 327, 329, 330, 332, 357, 471; Laws of 1854, chap. 270; *People ex rel. Hackley v. Kelly*, 24 N. Y., 74.)

*Per Curiam*. The order quashing writ of *habeas corpus* can only be reviewed by an appeal from the order. A writ of error will not lie in such a case. The papers upon both sides submitted upon this motion are so very defective that it is impossible to determine the merits involved, even if we had the power to pass upon them as we would have upon a regular appeal from the order complained of. The relator is not without remedy if the commitment by the surrogate was unauthorized and in excess of the power vested in that magistrate. Whether the surrogate had power to impose the fine of \$250 and commit the relator to prison until the same should be paid may be questionable, and upon the question of power the briefs of the counsel give no light, and as we cannot decide it we do not examine it. Doubtless the court below might have disregarded the defects of the petition for the writ of *habeas corpus*, and considered and disposed of the application of the relator for discharge upon the merits. The relator may now either appeal from the order quashing the writ, if he shall be advised that such dismissal was a legal error, or he may proceed *de novo* by a proper petition and a new writ of *habeas corpus*. The proceedings already had will not embarrass him, and his right to a discharge can be summarily decided.

As the writ of error gives this court no jurisdiction in the premises, it must be quashed, but without costs.

All concur.

Ordered accordingly



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Statement of case.

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JAMES CARPENTER, Plaintiff in Error, v. THE PEOPLE,  
Defendants in Error.

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| 180 | 511 |

A challenge to the array of a grand jury cannot be allowed. (2 R. S., 724, §§ 27, 28.)

A challenge to the array of petit jurors, at a Court of General Sessions for the city and county of New York, alleged that the jurors were not selected by the commissioner of jurors of said county, and that neither he nor any one on his behalf attended the drawing; but that the jurors were selected by one appointed by the mayor as commissioner, and that the statute, under which the mayor acted, was unconstitutional. *Held*, that the challenge showed upon its face that the jury were selected by an officer *de facto*, whose acts, in the exercise of the functions of the office, were valid as to the public, and whose appointment could not be questioned collaterally; and that therefore a demurrer to the challenge was properly sustained.

(Submitted March 20, 1876; decided April 4, 1876.)

ERROR to the General Term of the Supreme Court to review judgment affirming a judgment of the Court of General Sessions of the Peace in and for the city and county of New York, convicting plaintiff in error of the crime of burglary in the third degree.

Before the grand jury, by whom the plaintiff was indicted, were impaneled and sworn, his counsel interposed a challenge to the array of grand jurors which alleged substantially that Douglas Taylor was duly and legally elected and qualified as commissioner of jurors of the city and county of New York, but was illegally removed from office by the mayor of the city; that the jurors were not selected by him, nor by any person authorized by him, and that no person on his behalf attended the drawing of grand jurors, but that they were illegally selected by one Thomas Dunlap, who had no legal authority to act, who had been appointed by the mayor, in the exercise of a pretended right, and that the act of the legislature, under which the mayor acted, was unconstitutional, to which challenge the district attorney demurred and the

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Opinion of the Court, per RAPALLO, J.

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demurrer was sustained. On the trial the counsel for the prisoner challenged the array of petit jurors upon the same grounds. This challenge was also demurred to, and the demurrer sustained.

*Wm. F. Howe* for the plaintiff in error. The objection that the jurors had been improperly chosen, or by an unauthorized officer, was valid. (*Parker v. Thornton*, 2 *Ld. Raym.*, 1410; *Kennedy v. Williams*, 2 *N. & McC.*, 79; *Comm. v. Gallagher*, 4 *Pa. L. J.*, 520; *Jordan v. Meredith*, 3 *Yates*, 318; *Howland v. Gifford*, 1 *Pick.*, 38; *State v. Babcock*, 1 *Conn.*, 401; *Stanton v. Beadle*, 4 *T. R.*, 473; *Russell v. Ball*, *Barnes*, 455; *King v. Tremayne*, 7 *B. & R.*, 684.)

*Benj. K. Phelps*, district attorney, for the defendants in error. The demurrer to the challenge was properly sustained. (*Leech's Case*, 9 *Howell's State Trials*, 358; *Friery's Case*, 2 *Keyes*, 452; *Ferris' Case*, 31 *How. Pr.*, 140; *People v. Jewell*, 3 *Wend.*, 321; 6 *id.*, 388; *Cohn v. Smith*, 9 *Mass.*, 107; *State v. Brooks*, 9 *Ala. [N. S.]*, 1.)

RAPALLO, J. The challenge to the array of grand jurors was properly disallowed. Under the provisions of 2 Revised Statutes (p. 724, §§ 27, 28) no such challenge can be allowed.

The challenge to the array of petit jurors is founded wholly upon the allegation that the jurors were not selected by Douglas Taylor, the commissioner of jurors of the county of New York, and that he did not, nor did any person on his behalf, attend the drawing of such jurors. But it is also stated in the challenge, that the jurors were selected by Thomas Dunlap, who had been appointed by the mayor of the city such commissioner of jurors. That the mayor exercised a pretended right to appoint Dunlap, but that the act of the legislature under which the mayor appointed him was unconstitutional.

It thus appears, on the face of the challenge, that the person who acted as commissioner of jurors had been appointed

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Statement of case.

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to that office by the mayor of the city of New York, in pursuance of an act of the legislature, and that under color of that appointment he assumed to and did exercise the functions of the office. He was therefore a *de facto* officer, whose acts were valid as to the public, so long as he continued to occupy and exercise the functions of the office; and the validity of his appointment could not be drawn in question in this collateral manner. The demurrer to the challenge was, therefore, properly sustained.

The judgment must be affirmed.

All concur.

Judgment affirmed.

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JOHN DOLAN, Plaintiff in Error, v. THE PEOPLE OF THE  
STATE OF NEW YORK, Defendants in Error.

A plea in abatement to an indictment is to be strictly construed; it must be drawn with precision and accuracy and must be certain to every intent.

A plea in abatement to an indictment found at a Court of General Sessions in the city of New York alleging that the annual grand jury list was not wholly selected, as required by statute (chap. 498, Laws of 1853), from the petit jury lists made out by the commissioner of jurors, without any averments of fraud or design, is not good. The fact that a few names not appearing on the petit jury lists are accidentally put upon the grand jury list does not vitiate the whole list, and that it was by accident or oversight is to be presumed in the absence of allegations of fraud or design.

Nor is it a good plea that some one of the fifty selected as the special panel of grand jurors (§ 28, chap. 539, Laws of 1870) was not upon the petit jury lists, in the absence of an allegation that the persons actually sworn and impaneled were not upon that list. It is necessary also in such a plea to give the names of the persons alleged to have been selected and drawn who were not upon the petit jury lists.

It is not a good plea that the commissioner of jurors was prevented by duress from attending upon or supervising the grand jury. In the absence of allegations as to how the grand jury was drawn and by whom, it is to be presumed that the drawing was made by some other person claiming the office, acting as *de facto* commissioner, and recognized as such by all the officers having relations with him or his work; and a jury drawn by a *de facto* commissioner is regular.

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Statement of case.

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An indictment setting forth a felony and then charging the killing of another by the accused while engaged in the commission thereof, is not void for duplicity. It charges but one offence, that of murder in the first degree, within one of the definitions of that offence in the act of 1873 (chapter 644, Laws of 1873), *i. e.*, the killing by a person while engaged in the commission of a felony.

Where one breaks into a dwelling-house burglariously with intent to steal, he is engaged in the commission of the crime until he leaves the building with his plunder; and if, while engaged in any of the acts immediately connected with his crime, he kills a person resisting him he is guilty of murder under said statute.

It is not necessary in an indictment charging the crime of murder under said provision to allege that the killing was "without any design to effect death;" an allegation that it was willful and felonious is proper and sufficient. The object of the words quoted is to dispense with proof of a design to effect death, not to require proof that there was no such design.

(Argued March 20, 1876; decided April 4, 1876.)

ERROR to the General Term of the Supreme Court in the first judicial department, affirming a judgment of the Court of Oyer and Terminer of the city and county of New York convicting plaintiff in error of the crime of murder in the first degree. (Reported below, 6 Hun, 232.)

The indictment contained four counts. The first count alleged, in substance, that the accused burglariously broke and entered the store of one James H. Noe, in the city of New York, with intent, feloniously and burglariously, to steal, take and carry away the goods of said Noe therein. That, while he was engaged in the commission of said burglary he assaulted and willfully and feloniously struck the said Noe upon the head with a piece of iron, inflicting a mortal wound of which he died, and so that he willfully and feloniously killed and murdered said Noe. The second count charged the killing while the accused was engaged in the crime of robbery from the person of said Noe. The third charged the killing with a deliberate and premeditated design to effect death. The fourth was a common-law count for murder.

The prisoner interposed a plea in abatement to the indictment to the effect that the pretended grand jury which found

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Statement of case.

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the indictment "was not a grand jury of the county of New York, because the list and annual panel of so called grand jurors was not, as the law demanded, wholly selected from the petit jury lists (made out by Douglas Taylor, commissioner of jurors), when said grand jurors were selected by the mayor, first judge of the Common Pleas, chief justice of the Superior Court and city judge, at their annual meeting in September, 1875, to select grand jurors for the county of New York for the year then next ensuing. But said list and alleged panel contained names of persons, as also the alleged special panel of grand jurors for the said October term of this court contains persons, who were not upon the said petit jury list made out by Douglas Taylor, commissioner of jurors. As well as for that Douglas Taylor who, during the whole of the year A. D. 1875, was and now is commissioner of jurors of the city and county of New York, did not attend upon or supervise the drawing in September, last past, of the alleged panel of grand jurors, which was by the sheriff returned to this court for the October term thereof, and from which panel was by this court sworn as pretended and acting grand jurors the persons and the foreman who presented, found, filed and signed the alleged indictment, as aforesaid, against this defendant, although said Douglas Taylor, commissioner of jurors aforesaid, was then and there desirous of attending upon said drawing, but was by duress prevented by the clerk of the county of New York from so attending."

The district attorney demurred to the plea. The prisoner's counsel joined in the demurrer and the plea was overruled. The prisoner's counsel challenged the array of petit jurors upon the same ground as in the case of *Dolan v. The People* (*supra*). The district attorney demurred to the challenge and the same was overruled.

*A. Oakey Hall* for the plaintiff in error. The indictment upon which plaintiff in error was arraigned, tried and convicted was wholly invalid. (1 Bish. Cr. Proc. [2d ed.], §

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Opinion of the Court, per EARL, J.

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738; *Rawles v. State*, 8 S. & M., 599; *State v. Williams*, 5 Porter, 130; *People v. Robinson*, 2 Park., 311.) The first count of the indictment, to which only the verdict attaches, does not legally support a conviction of murder in the first degree. (*Dawson's Case*, 25 N. Y., 402; 1 Crit. Cr. L., 231; Bish. on Cr. Proc. [2d ed.], 187, §§ 320, 321; *U. S. v. Davis*, 5 Mason, 356, 361; *Foster's Case*, 50 N. Y., 604, 609; Whar. on Hom., § 176.)

*Benj. K. Phelps*, district attorney, for the defendants in error. Mere irregularities in the discharge of duties imposed upon ministerial officers in the execution of the jury law, not operating in fact to the prejudice of the prisoner, furnish no ground for objection to proceedings against him. (*Friery's Case*, 2 Keyes, 452; *Ferris' Case*, 31 How. P., 140; *People v. Jewett*, 3 Wend., 321; 6 id., 388; *Stokes v. People*, 53 N. Y., 164; *Cohn v. Smith*, 9 Mass., 107; *State v. Brooks*, 9 Ala. [N. S.], 1.) The commissioner of jurors is neither required to select nor to attend the drawing of petit jurors. (Laws 1847, chap. 495, § 4; Laws of 1853, chap. 498, § 6; 2 Fay's Digest, 387.) The legality of the appointment of Dunlap could not be attacked in this collateral proceeding. (*Leech's Case*, 9 Howell's State Trials, 358; *People v. Collins*, 7 J. R., 549; *McInsley v. Tanner*, 9 id., 135; *Wilcox v. Smith*, 5 Wend., 231; *People v. Stevens*, 5 Hill, 616; *People v. Cook*, 8 N. Y., 67.) The Court of Oyer and Terminer, being of controlling criminal jurisdiction, had abundant authority to try this cause. (*People v. Guy*, 10 Wend., 509; *People v. Gen. Sess. of N. Y.*, 3 Barb., 144; *People v. Judges of Dutchess O. & T.*, 2 id., 282; *Quimbo Appo v. People*, 20 N. Y., 531; *People v. Myers*, 2 Hun, 6.) The first count of the indictment, although unnecessarily explicit, was not bad. (*People v. Allen*, 5 Den., 76; *Lohman v. People*, 1 Comst., 379.)

EARL, J. By the demurrer to the plea in abatement, the following facts must be deemed admitted: That the annual

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panel of grand jurors for the year 1875 for the county of New York was not wholly selected from the petit jury lists made out by Douglas Taylor, commissioner of jurors, and that that panel, as well as the special panel of grand jurors drawn to serve at the term of court at which the defendant was indicted, contained the names of person who were not upon the petit jury lists made out by Taylor; that Taylor, who was commissioner of jurors, did not attend upon or supervise the drawing of the grand jurors who were summoned by the sheriff, and from whom the grand jurors who found the indictment were taken; and that he was prevented from attending such drawing, although desirous of so doing, by the duress of the county clerk. It is claimed, on behalf of the defendant, that these facts show that he was not properly indicted, and, therefore, that he was not properly convicted, and this presents the first question for our consideration. It will be useful to bring under review the various laws applicable to the city of New York relating to the selection and drawing of jurors, so that we may see the precise bearing of the defects alleged in the plea demurred to.

Under the Revised Statutes (2 R. S., 412, § 21) it was provided that in the city of New York each ward should be deemed a town for the purpose of returning petit jurors, and that the common council of the city should provide by ordinance the manner in which, and how often, such selection should be made, and the officers and persons by whom it should be conducted. A list of the jurors thus selected was required to be deposited with the county clerk, and he was required to draw thirty-six jurors to attend courts, in the presence of the county judge and sheriff. (§§ 24, 27, 29.) A certified list of the persons thus drawn was to be delivered to the sheriff, and he was to summon the persons thus drawn. In 1830, by chapter 24, section 4 of the laws of that year, the number of jurors to be drawn for any court was not exceeding eighty-four instead of thirty-six, and thus the law as to selecting and drawing petit jurors remained until 1847.

By the Revised Statutes (2 R. S., 720, § 2) it was provided

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that the mayor, recorder and aldermen of the city of New York should meet in July in each year as a board of supervisors of that city and county, and should prepare a list of the names of 600 persons to serve as grand jurors at the different courts to be held in the city during the then ensuing year, and until new lists should be returned. The list was required to be returned to the county clerk. He was required to put the names into a box and draw therefrom, from time to time, in the presence of the sheriff, county judge or other officers named, twenty-four persons to serve as grand jurors (§ 10), and he was required to deliver a certified list of the names thus drawn to the sheriff, and he was required to summon them. By chapter 332 of the Laws of 1841, the number required to be drawn was changed to thirty-six, and thus the law remained until changed as mentioned below. In 1847 (chap. 495) it was provided that the list of petit jurors should be made by a person to be appointed by the supervisors of the city, the judges of the Supreme Court and the judges of the Court of Common Pleas, and known as the commissioner of jurors. He was required to make a list of all persons liable to perform jury duty, and return the same to the county clerk. The names thus returned were required by the county clerk to be placed in a box, and he was to draw the jurors, as before provided, to serve at the courts, and the persons thus drawn were to be summoned by the sheriff. In 1853 (chap. 498) it was provided that the persons to serve as grand jurors in the city of New York should be selected from the persons whose names are contained in the list of petit jurors, for the time being, for said city, by a board to consist of the mayor, presiding judge of the Supreme Court, chief justice of the Superior Court, the first judge of the Court of Common Pleas, the recorder and the city judge. They were required to meet annually at the office of the commissioner of jurors on the first Monday of September, and organize by the selection of one of their number as chairman, four of their number constituting a quorum. The commissioner of jurors was required to attend their meeting,



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act as clerk, and produce to them all the lists of jurors in his possession. They were required to select from these lists a list of not less than 600, nor more than 1,000 persons, to serve as grand jurors in the city until the next list shall be prepared and the names deposited. The list thus selected was required to be certified by the officers making it, and filed in the office of the county clerk. The names upon the list thus made and filed were to be placed in a box by the county clerk, and he was to draw therefrom the names of the persons who were to serve at any court as grand jurors in the manner then provided by law, except that one or more judges of a court of record were required to be present at the drawing and certify the same. The number to be drawn was not changed, and they were to be certified to and summoned by the sheriff.

In 1870 (chap. 539) the law was again somewhat changed as to the powers and duties of the commissioner of jurors, and the selection and drawing of jurors. The commissioner of jurors was required to commence the preparation of lists of petit jurors in the month of May in each year, and insert therein the names of all persons possessing the qualifications mentioned in the law. The law as to filing the lists in the county clerk's office and drawing and summoning petit jurors was left unaltered; and the law as to the selection, certifying and filing of the annual list of not less than 600 nor more than 1,000 grand jurors was also left unaltered. Section 28 of that chapter, however, provides that "grand jurors shall be drawn and summoned in the same manner as petit jurors," and that "the ballots shall be prepared by the commissioner of jurors, and after being carefully compared with the lists regularly selected, shall be placed in the grand jury box. Unless the Court of Oyer and Terminer, or the Court of General Sessions, shall otherwise direct, the commissioner shall draw fifty grand jurors for each of said courts on the same day that petit jurors to be impaneled at the same time shall be drawn." This was the first law which authorized the commissioner of jurors to draw any jury. Before that

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both petit and grand jurors were required to be drawn by the county clerk in the presence of the officers named. Such is still the law, except as to the grand jurors, and they are now required to be drawn by the commissioner at the county clerk's office, in the presence of the same officers as before required, and to be certified and summoned as before. Although fifty are required to be drawn and summoned, as a grand jury cannot be composed of more than twenty-three, nor less than sixteen persons, the court must select from those appearing the requisite number and excuse or discharge the rest. (2 R. S., 724.) The plea contains no allegation of any corruption, dishonesty or unfairness on the part of any of the officers in selecting and drawing the grand jurors, or of any design to injure the defendant or any other person, and it contains no allegation that any of the persons who were upon the grand jury which indicted the defendant did not possess the qualifications of grand jurors, or that any person was upon the jury who would not have been there if all the forms of law which are claimed to have been disregarded had been strictly complied with. It is not apparent how the alleged irregularities harmed the defendant, and it is certain that they had no relation whatever to the question of his guilt or innocence of the crime charged. Under such circumstances the indictment should be upheld, unless the facts pleaded point out some vital error. A plea in abatement is a dilatory plea, and it is a general rule that it must be strictly construed. The greatest accuracy and precision are required in framing it, and it must be certain to every intent. (1 Chit. Pl., 445, 458; 1 Bishop on Cr. Pro., § 324; *O'Connell v. Regina*, 11 Cl. and Fin., 155; *State v. Bryant*, 10 Yerger, 527; *State v. Newer*, 7 Blackf., 307; *State v. Brooks*, 9 Ala., 1; *Hardin v. State*, 22 Ind., 347.)

There is abundant answer to that portion of the plea alleging that the annual list of grand jurors was not wholly selected from the petit jury lists made out by Taylor as commissioner of jurors. It is not denied that the jurors were selected at the proper time and place. We must assume, as

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there are no allegations to the contrary, that the board, composed of the mayor and other officers, met on the first Monday of September, 1875, at the office of the commissioner of jurors, and organized as required by law; that Taylor was there and produced to them all the petit jury lists then in his office, and that they selected mainly from such lists not less than 600 nor more than 1,000 persons who were qualified to serve as jurors. It is not alleged how persons came to be selected whose names were not upon the petit jury lists, nor how many were thus selected. It will answer the allegation of the plea to suppose that the number was not more than two or three. No authority can be found holding that in such a case the whole list is irregular and null, so that none of the persons on it could be drawn for grand jurors, because a few names, without fraud or design, were, as we may assume, by accident or oversight, also put upon it. From the list of names thus selected the law requires fifty to be drawn and summoned to attend a court. This precise number is fixed by the statute for no purpose of benefit or advantage to the persons who may be presented for indictment. The sole object of requiring this number is to secure the attendance at court of a sufficient number to constitute a grand jury. If more or less should be drawn no harm would be done any accused person, provided a sufficient number of qualified jurors were drawn and impaneled. No person who may be complained against before the grand jury can have any part in the selection from the fifty of those who are to constitute the grand jury. The duty of selection devolves upon the court. It may select a sufficient number and discharge the rest, and it may determine in its own way what mode shall be used to make the selection from the fifty, and for what reasons any of the fifty may be discharged or excused. Hence, the fact that some one of the fifty may not have been upon the petit jury list made by Taylor, so long as there is no complaint that all the persons actually sworn and impaneled were not upon that list, shows no error of which the defendant could take advantage by plea in abatement or

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otherwise. (*Ferris v. The People*, 31 How. Pr., 140; *Friery's Case*, 2 Keyes, 424; *Vanhook v. State*, 12 Texas, 252.) Courts do not look with indulgence upon objections to irregularities in the mode of selecting or drawing grand jurors committed without fraud or design, which have not resulted in placing upon any panel disqualified jurors.

But the portion of the plea we are now considering is defective for another reason. It does not give the names of the persons who are alleged to have been selected and drawn, and who were not upon the petit jury lists. This is always required in a plea of abatement when defects of such a character are alleged. Suppose the plea had been that a number of the jurors actually impaneled were not qualified, or that they had not been sworn, a plea setting up such matters for the purpose of quashing the indictment would have to specify the names. In *O'Connell v. Regina* (*supra*) a plea in abatement that certain of the witnesses, upon whose evidence the indictment was found, were not sworn, was held bad upon general demurrer, among other reasons, because the names of the witnesses were not given in the plea. In this case the names should have been given, so that if the district attorney had chosen to join an issue of fact upon the plea he would have known precisely what allegations he would have to meet.

But a more serious allegation of error is the one that Taylor, who was commissioner of jurors, was prevented by duress from attending upon or supervising the drawing of the grand jury for the October term. But here again the allegations of the plea are very meager and deficient. It is admitted that the jury was drawn by some one. The county clerk may be assumed to have been present, as he was required to draw the petit jury at the same time, and probably, also, to certify the drawing of the grand jury. We must assume that the drawing was at his office; that the other officers required to be present were there; that the ballots were prepared, compared and deposited in the grand jury box by some one acting as commissioner of jurors, and claiming the right to act as such; that his action was recognized by the officers who witnessed

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and were required to witness the drawing; that the jurors drawn were certified to the sheriff by the proper officer, and were summoned by him; that they appeared and were sworn, impaneled and recognized by the court as the grand jury, without any objection from any one. All these facts must be assumed, as none of them are denied, some of them admitted and all required by the statute. The plea does not disclose how the jury was drawn, nor by whom. There is no allegation in it that the drawing was not made by a person acting and claiming the right to act as commissioner, and there is no allegation that Taylor acted as such at any time. The allegation as to him is simply that he was commissioner during that year, which allegation is fully satisfied by construing it to mean that he was, *de jure*, commissioner. Consistently with that allegation, therefore, applying the rule of strict construction applicable to such a plea, we may hold upon all the facts above alluded to that some other person claimed the office and was acting, at least, as a *de facto* commissioner, and that he was recognized as such by all the officers who had relations with him or his work. The maxim *omnia præsumantur rite et solenetur esse acta donec probetur in contrariam* may be invoked against the loose and uncertain allegations of irregularity and error contained in the plea to fortify the conclusion we have reached that the jury, if not drawn by a *de jure* commissioner was, at least, drawn by a *de facto* commissioner. A jury drawn by a *de facto* commissioner would be as regular as one drawn by a *de jure* commissioner. (*Leech's Case*, 9 Howell's State Trials, 358; *Wilcox v. Smith*, 5 Wend., 231; *People v. Cook*, 8 N. Y., 67.) The case of *O'Connell v. Regina* (*supra*) shows how strictly such pleas are construed. There the plea was that the indictment was found upon the evidence of four witnesses, and that the said witnesses were not sworn and the plea was held bad, among other reasons, because there was no averment in the plea that the bill was not found upon the evidence of other witnesses who were sworn besides those who were alleged to have been examined without being sworn, and

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because, also, the four witnesses might have been authorized by law to give their evidence upon affirmation instead of upon oath. So there is no averment in this plea that the jury was not drawn by some one who was acting, and claiming the right to act, as commissioner of jurors. In *Leech's Case*, a plea in abatement that the grand jurors were returned by two persons, naming them, who were not sheriffs, was held bad, because the court might infer that the persons named acted as *de facto* sheriffs and were recognized as such. We therefore conclude that the demurrer to the plea was properly sustained.

It is claimed that the defendant could not be convicted of murder in the first degree under the first count, on the ground that that count was void for duplicity in setting up two distinct offences, a burglary and a homicide in some degree. That count first describes a burglary in the third degree in form so as to show that a complete offence was committed, and then charges that the defendant, while engaged in the commission of the burglary, committed the murder charged. There was but one offence charged, that of killing while engaged in the commission of a felony. (Laws of 1873, chap. 644.) An indictment under that provision of the statute must describe the felony and state, substantially, facts showing that the accused was engaged in the commission thereof. It certainly can do no harm to the accused, and could not mislead him as to the charge he was called upon to answer, that the offence was described more fully or minutely than necessary. It is obvious that only one offence was designed to be charged in the count, and no one could read it without knowing that the charge was murder while engaged in the commission of the felony described.

It is further claimed that the first count is defective in charging that the killing was committed after the complete offence of burglary had been committed, and not while the accused was engaged in the commission of the burglary. The count does not bear this construction. It describes a complete burglary and then alleges that the accused committed

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the murder while engaged in the burglary, not after he had committed it. If a burglar break into a dwelling-house burglariously, with the intent to steal, the offence is doubtless complete before he leaves the building, but he may be said to be engaged in the commission of the crime until he leaves the building with his plunder; and if, while there engaged in securing his plunder, or in any of the acts immediately connected with his crime, he kills any one resisting him, he is guilty of murder under the statute.

Murder in the first degree is described in the act of 1873 as follows: "First. When perpetrated from a deliberate and premeditated design to effect the death of the person killed, or of any human being. Second. When perpetrated by an act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual. Third. When perpetrated without any design to effect death by a person engaged in the commission of any felony." It is further claimed that this count is defective, because it was not alleged therein that the killing was "without any design to effect death," the allegation on the contrary being that the killing was "willful and felonious." It is undoubted law that an indictment upon a statute must state all the facts and circumstances which constitute the statute offence, so as to bring the accused perfectly within the provisions of the statute, but it need not contain the words of the statute. It is generally sufficient if it contain the substance and effect of them. (*People v. Allen*, 5 Denio, 76; 1 Bish. on Cr. Pro., § 612.)

The Revised Statutes (2 R. S., 546, § 5) contained the same definition of murder as that of murder in the first degree under the statute of 1873, except in the first division of section 5, in the Revised Statutes, the word "deliberate," before "premeditated," was omitted. In 1860 (chapter 410), murder in the first degree was described as follows: "All murder which shall be perpetrated by means of poison or by lying in wait, or by any other kind of willful, deliberate and



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premeditated killing, or which shall be committed in the perpetration or the attempt to perpetrate any arson, rape, robbery or burglary, or in any attempt to escape from imprisonment, shall be deemed 'murder of the first degree.'” In 1862 (chapter 197), the definition of murder as contained in the Revised Statutes, was applied to murder in the first degree, except that the third subdivision of section 5 was altered to read as follows: “When perpetrated in committing the crime of arson in the first degree.”

Under the first subdivision of section 5, in order to constitute murder in the first degree, the killing must have been from deliberate and premeditated design. The object of the third subdivision was clearly in contrast with the first, to make any killing while engaged in the commission of a felony, murder in the same degree, although there was no design to effect death. The sole purpose of the words, “without any design to effect death,” was to dispense with proof of any design. It cannot be supposed that the legislature meant to require proof in such a case that the killing was absolutely without any design to effect death, and in case of such proof to make it murder in the first degree, whereas, in case of proof of design to effect death, it meant to make it a homicide in a lower degree. Under the statutes of 1860 and 1862 the particular felonies were described in the commission of which killing would be murder, and under those statutes the killing, with or without design, was murder in the first degree. The only change sought to be effected by the statute of 1873, was to remove the limitation as to the specified felonies, and to make killing murder in the first degree, if done while engaged in the commission of any felony. It would be quite absurd so to construe the statute as to enable a person charged with murder, under the third subdivision of section 5, to establish a defence by proving that he designed the murder. We are, therefore, of opinion that the first count of the indictment fully describes the offence of murder in the first degree by alleging in proper words that the defendant, willfully and feloniously, killed



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Noe while he was engaged in the commission of the felony of burglary.

We have thus, with the care the importance of this case requires, considered and disposed of all the questions which were orally discussed before us. We have also carefully considered all the allegations of error contained in a printed brief submitted to us, and it is sufficient to say of them that they are clearly without foundation, and were sufficiently considered and properly disposed of in the opinions in the Supreme Court.

The judgment must be affirmed.

All concur.

Judgment affirmed.

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THE PEOPLE ex rel. MARY A. SCHANCK, Executrix, etc.,  
Appellant, v. ANDREW H. GREEN, Comptroller, etc.,  
Respondent.

THE PEOPLE ex rel. THE NEW YORK DISPENSARY, Appellant,  
v. ANDREW H. GREEN, Comptroller, etc., Respondent.

Under the charter of the city of New York of 1873 (chap. 835, Laws of 1873) the common council have authority to take leases of real estate for the benefit of the city, and to determine what property shall be leased, and for what period, subject to the limitations and restrictions of said charter.

This authority is not limited to the taking of such leases as are provided for by appropriations. The provision of said charter prohibiting the incurring of expenses not thus provided for (§ 89), has reference to the expenditures of the several departments, not to the action of the common council in leasing property deemed by it to be required for city purposes.

In a return to a writ of alternative mandamus directed to the comptroller requiring him to lease from relators certain premises as authorized and directed by the common council, or to show cause, etc., the comptroller alleged, in substance, that there was no sufficient appropriation to pay the rent. *Held*, that he was estopped from claiming that it was not his duty to execute the lease, and that the common council had no authority

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to require him to do so, as he had not based his refusal or his defence to the writ upon that ground.

*It seems*, however, that the common council has power to authorize and to require the comptroller to supervise the taking of a lease and to execute it on behalf of the city.

The provision of said charter (§ 15), making the signature of the clerk of the common council necessary to all leases, etc., refers only to leases from the city corporation, and does not include those to it.

*People ex rel. v. Green* (6 Hun, 11) reversed.

(Argued March 28, 1876; decided April 4, 1876.)

THESE were appeals from orders of the General Term of the Supreme Court in the first judicial department. (Reported below, 6 Hun, 11.)

The order in the case first entitled reversed an order of Special Term quashing defendant's return to an alternative writ of mandamus, and directing a peremptory writ to issue.

In the case secondly entitled the order reversed an order of Special Term sustaining a demurrer to defendant's return to an alternative writ, and directing a peremptory writ to issue.

The writ in each case required the comptroller, on behalf of the city, to lease certain premises therein described upon the terms and conditions and for the term specified in certain resolutions of the common council of the city, duly adopted and approved, which authorized and directed such leasing.

The return in each case alleged, in substance, that the appropriation for the payment of rents for the year was insufficient after the payment of rents upon leases already taken to pay the rent of the property in question.

*A. C. Brown* for the relators. The common council had power to devolve upon the comptroller the duty of taking leases. (*People v. Wood*, 4 Park., 147; *People v. Connolly*, 2 Abb. [N. S.], 321; *In re Lowber*, 7 Abb., 158.)

*T. B. Clarkson* for the respondent. The common council could not devolve on the comptroller or confer on him the power to execute such leases. (Laws 1873, chap. 335, pp.

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486, 492-495, §§ 2-18, 29-35.) The common council had no power to accept or execute, or to authorize the acceptance or execution by the city as lessee of a lease for a longer term than the current financial year. (Laws 1873, chap. 335, pp. 517, 518, 486, 487, 491, 508; Laws 1873, chap. 757, § 20, p. 1126.)

MILLER, J. The authority of the common council of the city of New York to take a lease of real estate for the benefit of the corporation, although not conferred in express terms, is distinctly recognized as one of the inherent powers possessed by that body, under the charter of the city. Section 14, Session Laws of 1873, chapter 335, declares that in case of any ordinance or resolution of the common council, which involves the lease of real estate or franchise, the votes of three-fourths of the members of the board shall become necessary to its passage. Section 18 enacts that the common council shall have no power to take or make a lease of any real estate or franchise, save at a reasonable rent, and for a period not exceeding five years, unless specially authorized so to do by an act of the legislature.

From these provisions alone the conclusion is inevitable that the common council, in the exercise of its legislative powers, is vested with full authority to decide, subject to the mayor's approval as the charter requires, what property shall be leased for public purposes and for what period, not exceeding the time provided by law. As will hereafter be manifest, there are no other provisions of the charter which are in conflict with those already cited, or which in any way prevent a compliance with the requirements of the same.

Assuming, then, that the common council have authority to take leases, it necessarily follows as a legal conclusion that they possess ample power, as that duty could not be conveniently performed by that body as such, to authorize some person in office to supervise the taking of a lease and to see that such instrument contains the proper covenants and conditions, and the evidence of the obligations which the parties

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assume to perform, as well as to direct who shall execute the same, unless such duty by law devolves upon some other officer of the corporation. The resolution in each of the cases now considered was evidently intended to select the comptroller as a proper officer to supervise the leasing of the property therein mentioned, and not merely to direct the formal execution of the leases which were authorized. Although the charter contains no provision that the comptroller shall perform that business, it does not prohibit it, and as he is the head of a department whose especial duty it is to look after and protect the financial interests of the city, it would appear to be eminently appropriate that this officer should be designated for such a purpose. It is then clearly within the power of the common council, in the discharge of its legislative functions, to impose upon one of the officers of the city government a duty which requires the exercise of intelligence, sound judgment and discretion, as to the terms and conditions of agreements of this character, which to a considerable extent must be governed by the wants of the city, the nature of the property leased and the uses to which it is to be appropriated, and in this respect they have not exceeded their authority.

The right to exercise such power is also sanctioned by section 90 of the charter, which authorizes the common council to make provisions and regulations other than those specially authorized in the charter for the organization, perfecting and carrying out the powers and duties therein prescribed in any department. Under this provision the duty might be imposed by ordinance, and a resolution to the same effect stands upon a similar footing.

As the common council had a clear right to direct the comptroller to lease the property, and by the resolutions they intended, manifestly, to include the execution of the leases, no sufficient reason is shown why these instruments should not be carried into effect. The affixing of a signature or of a seal, or both, to an instrument of this kind involves the performance of a mere clerical act, and where a lease is accepted

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and taken by the lessee, and benefits received thereby, it is obligatory and valid without even the signature of the lessee. The act of acceptance of the demise of itself would render the lessee liable for the payment of the rent, and hence it by no means follows that the resolution of the common council may not be made effective, even although the instrument is not formally signed.

It is claimed, however, that the duty of executing leases on behalf of the city must be performed by the clerk of the common council, in pursuance of section 15, which enacts, that "he shall keep the seal of the city, and his signature shall be necessary to all leases, grants and other documents, as under existing laws." This provision is evidently confined to the instruments or documents named which were required to be signed by the clerk, and which included leases and grants from the city which were authorized by law, and as there are no "existing laws" which require the clerk's signature or the seal of the corporation to a lease to the city, it is not plain how the clerk's signature is necessary to the leases in question. Moreover, even if such was not the case, it is a complete and full answer to this objection that the comptroller, in his return to the writ of mandamus in each of those cases, does not place his defence upon the statute cited. He did not refuse to perform the duty imposed upon him for any such reason, and he claims no exemption, personally or officially, except upon the broad ground, that, according to the provisions of the charter, no appropriation has been made for the payment of rent under these leases, and hence the resolutions were unauthorized. Had he refused originally because he was not a proper officer to execute the leases, the objection might have been obviated, perhaps, by further action of the common council. As he did not decline for that reason, we think he is estopped from raising that question in this stage of the case, and that the point made is not now properly before us for our consideration. It may also be remarked that if this objection had any force, the order of the Special Term might have been modified so as to require the

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comptroller to accept the leases on behalf of the city, and by leaving it for the common council to direct that the clerk, or some other officer to be designated, should sign and seal them.

It is further insisted that the duty imposed upon the comptroller by section 29 of the charter is inconsistent and irreconcilable with the practice of executing leases on the behalf of the city. The answer to this position is, that it is evident from the phraseology employed that the section cited does not embrace leases to the city, but applies to contracts for work and supplies, which must be made by some officer and necessarily be in writing. It could not even apply to an oral lease for a year, and would be in direct conflict with the right of the city authorities to take a lease for any longer period of time, and thus, as we have seen, be inconsistent with the provisions of the charter. In support of the views expressed, it may be observed that the power of the common council to authorize and direct the comptroller to take leases on behalf of the city has been held to exist under the charter of 1857, which contained the same provision as to the custody of the seal and the duty of the clerk as the present charter. (See *People v. Wood*, 4 Park., 147; *People v. Connolly*, 2 Abb. [N. S.], 321; *In re Lowber*, 7 Abb., 158.) These decisions are by no means controlling, but show the existence of a practice which has long been tolerated, and which is also shown by the return to the mandamus in each of the cases now considered.

The objection that the common council had no power to authorize the leases in question without some provision for the expenses of the same, is also without force. Section 89 of the charter prohibits the incurring of any expense by any department, ward or officers of the city government, unless an appropriation shall have been previously made covering the expense. Section 112 requires that the board of estimate and apportionment shall annually make a provisional estimate of the amounts required to pay expenses of conducting the public business of the city for the next ensuing financial

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Opinion of the Court, per MILLER, J.

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year, and that, after this is signed, the several sums shall become appropriated, and declares that no department or officer shall incur any expense in excess of the sum appropriated. These enactments have reference to the expenditures of the several departments and to appropriations made by them, and not to the action of the common council in taking a lease, as authorized by law. The common council constitutes the legislative power of the city government, and the charter does not in any way limit its action merely to the taking of such leases as may be provided for by the board of estimate and apportionment. As the right to take a lease for five years is beyond dispute, it cannot be controlled or taken away by reason of a failure to make an appropriation. If the common council was thus confined in the exercise of its lawful authority in accepting a lease, the legislative power in this respect would be vested in the board of estimate and apportionment and become subordinate to the finance department. The eighteenth section of the charter (*supra*) would also become nullified, and no lease could be authorized which was required by the public necessities, and which involved the expenditure of money, for more than a single year, as no appropriation could be made by the board of estimate and apportionment beyond this period. Even a lease commencing in a future year would be unauthorized.

Obviously, such could not have been the intention of the legislature, and is not a rational interpretation of the provisions of the charter cited. It was never designed that the appropriations of the board of estimate and apportionment should control legislative action which the charter warranted. This is also apparent from section 2 of chapter 308, Laws of 1874, which anticipates an insufficient appropriation, and that expenditures may exceed the appropriation; and makes provision for a transfer of an excess of the amount required or deemed to be necessary for the purposes or objects thereof, to such other purposes or objects for which the appropriations are insufficient, or as may be required; or if a balance remains unexpended at the end of the fiscal year, then the

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Statement of case.

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application of the same for the like purposes in the next succeeding year.

The common council has, no doubt, ample power in its legislative capacity, to lease property for the benefit of the city, as may be required for the use of the corporation which they represent; and there is no valid ground for claiming that before they can authorize a lease of five years to be taken, an appropriation must be made for that purpose, and that the board of estimate and apportionment must thus, in advance, sanction the act. The payment of the obligation incurred is a subject for consideration afterwards, and the question of appropriation for the payment of rent, after a lease has been made, is entirely different from the question arising as to the power to make such lease. It is not presented in these cases, but more properly would arise when payment of the rent is demanded. It will be time enough then to urge that there is no fund out of which payment can be lawfully made. The question is not whether the comptroller shall pay, but whether the common council has authority to exercise the legislative powers conferred by the charter for leasing property for city purposes. Regarding the subject in the point of view discussed, there is no conflict in the charter nor any want of harmony in its various provisions.

As no sufficient reasons are given in answer to the mandamus in either of the cases considered, the result must be that the orders of the General Term should be reversed, and those of the Special Term affirmed, with costs.

All concur.

Ordered accordingly.

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PETER BRUNER, Respondent, v. HENRY MEIGS et al., Trustees,  
etc., Appellants.

A suit in equity to rescind an agreement for the sale of real estate because of defect in title or want of power in the vendor to sell cannot be maintained, as the party has a perfect defence to any action brought against him to enforce the contract.



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Statement of case.

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The will of P. devised and bequeathed the residue of his estate, real and personal, after payment of debts, to his executors in trust, to rent and invest and pay the rents and income to his wife during her life, and immediately upon her death to divide the same into seven equal parts, and to hold the parts separately each during the life of a child of the testator named in connection therewith, paying to such child the rents and income, with directions upon the death of such child to convey, assign and deliver over said seventh part to his or her lawful issue, if no lawful issue to the wife or husband of such child, if surviving; if not, then to the testator's right heirs, with power to the executors during the existence of the respective trusts to sell and convey, change investments, etc. The wife of the testator died during his life. Two of the children also died before him, unmarried and without issue. H., another child, died after the testator, leaving issue. Plaintiff, after such death, contracted to purchase of the trustees a portion of the real estate. No division of the estate into shares had been made. In an action to recover back the purchase-money paid on the contract, *held*, that the two-sevenths designed for the two children who died before the testator, did not go to the trustees, but went directly to the testator's right heirs; that the estate vested in the trustees in the one-seventh held for the benefit of H. terminated upon his death; that the power to convey after the death of the *cestui que trust* to his issue did not constitute a trust or require the estate to be vested in the trustees, but was a power in trust merely which neither defeated nor delayed the vesting of the estate in those entitled in remainder; that the power to sell and change investments was a several power in respect to the property held under the respective trusts — not a general power embracing the whole estate to be exercised as long as any of the trusts continue — and that, therefore, as the trustees could not convey such title as plaintiff was bound to accept, the consideration had failed, and he was entitled to recover.

(Argued March 22, 1876; decided April 4, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department affirming a judgment in favor of plaintiff, entered upon decision of the court at Special Term. (Reported below, 6 Hun, 203.)

This action was brought for the cancellation of a contract of sale of certain premises in the county of Westchester, wherein defendants as trustees, under the will of John L. Palmer, deceased, were vendors, and plaintiff was vendee, and to recover back a payment of purchase-money made under said contract.

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Statement of case.

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Said Palmer died in February, 1858, leaving a will executed July 1, 1847, and leaving a large real and personal estate. At the time of the execution of the will the testator's wife and seven children were living.

The first clause of the will provided for the payment of debts and funeral expenses. The second clause is as follows:

“Second. I give, devise and bequeath all the rest, residue and remainder of my estate, real and personal, effects, property and rights of property, whatsoever and wheresoever, which I may have, own or be entitled to at the time of my decease, to my beloved wife, Margaret Palmer, my son-in-law Edwin A. Oelrichs, my son Henry Palmer, and my friend Henry Meigs, Jr., of said city of New York, the survivors and last survivor of them; to have and to hold the same unto them, the survivors and last survivor of them, as joint tenants, and not as tenants in common, their successors and successor, heirs and assigns forever; upon trust nevertheless, and to and for the uses and purposes following, that is to say: In trust, to take, receive and hold all the said rest, residue and remainder of my estate, effects, property and rights of property, during the life of my said wife, Margaret Palmer, to lease or let the real estate so to them devised, and to invest the personal estate and property, and the proceeds thereof, upon bond and mortgage on improved and productive real estate, in fee simple, situated in the said city of New York, or in public stocks of the United States, or of the State of New York, or of the city of New York, and to keep the same so invested; and to collect, get in and receive the rents, interests, income, dividends and profits thereof, and pay and apply such rents, interest, income, dividends and profits, from time to time, as realized and received, after paying with and out of the same and deducting therefrom all taxes, assessments, expenses of insurance and repairs, and other necessary and proper charges upon my said residuary estate, to the use of my said wife, Margaret Palmer, during her natural life, and her receipts shall be sufficient evidences of such payment and application, and good and sufficient acquittances and dis-

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Statement of case.

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charges therefor. And upon this further trust, and I do hereby devise, order and direct, that, immediately after the death of my said wife, all the said rest, residue and remainder of my estate, effects, property and rights of property, and the proceeds thereof, including all the rents, interest, income, dividends and profits thereof, or arising therefrom, not previously paid and applied in pursuance of the provisions hereinbefore contained, be, by the said Edwin A. Oelrichs, Henry Palmer and Henry Meigs, Jr, the survivors or survivor of them, their successors or successor, divided into seven equal parts or shares, and that in their ascertaining the amount of my said residuary estate for the purpose of such division into seven parts, they include in such estate, and compute as part thereof, all and every the sum and sums of money by me at any time advanced, or paid to or for, or on account of my seven children hereinafter named, each, any, or either of them; and charged to or against them, my said children, respectively, in my own handwriting, in a book of accounts kept by me at my dwelling-house, and marked on the inside of the cover thereof in my handwriting, 'John J. Palmer, number three,' but no interest shall be computed or charged upon any or either of said sums of money so paid or advanced. And that the said Edwin A. Oelrichs, Henry Palmer and Henry Meigs, Jr., the survivors or survivor of them, their successors or successor, thereupon take, receive, have, hold, use and dispose of the said seven equal parts or shares of my said residuary estate, and each of such parts or shares, severally and separately, and the income thereof, and I give, devise, and bequeath the same, and each of them, severally and separately, and the income thereof, to, for and upon the trusts, uses and purposes following, that is to say:—

The seven succeeding clauses disposed each of one-seventh part for the use and benefit of a child of the testator, therein named, during life. These clauses were similar, varying only in accordance with the sex of the beneficiary, for life. Of one of these clauses, the following is a copy:

“Sixth. That they, the said Edwin A. Oehlrichs, Henry

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Statement of case.

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Palmer and Henry Meigs, Jr., the survivors or survivor of them, their successors or successor, upon and immediately after the death of my said wife, take, receive and hold one other equal one-seventh part or share of my said residuary estate, to be ascertained in the manner above provided, less the amount of the several sums of money by me advanced, or paid to, for or on account of my son Henry Palmer, and charged to or against him in the said book of accounts above mentioned, during the natural life of my said son Henry. That they lease or let the real estate belonging thereto, and invest the personal estate and property upon bond and mortgage on improved and productive real estate, in fee simple, situated in the city of New York, or in public stocks of the United States or of the State of New York, or of the city of New York, and keep the same so invested. That they collect, get in and receive the rents, interest, income, dividends and profits thereof, and pay and apply such rents, interest, income, dividends and profits from time to time, as realized and received (after paying with and out of the same all taxes, assessments, expenses of insurance and repairs, and other necessary and proper charges upon the said last-mentioned one-seventh part), to the use of my said son Henry, during his natural life, and his receipts shall be sufficient evidence of such payment and application, and good and sufficient acquittances and discharges therefor; and that they, upon and immediately after the decease of my said son Henry (after the death of my said wife) leaving lawful issue him surviving, or, in case of his decease before the death of my said wife, leaving lawful issue surviving at the time of her decease, then upon and immediately after the death of my said wife, convey, assign, transfer, make over, pay and deliver all the said last-mentioned one-seventh part of my residuary estate (less the deduction last aforesaid), and the proceeds thereof then remaining, and all the property and rights of property in which the same or any part thereof shall then be invested, and all interests, income, dividends and profits thereof, or arising therefrom,

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Statement of case.

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not previously paid and applied in pursuance of the provisions hereinbefore contained, to the then surviving child or children of my said son Henry, and the then surviving lawful issue of any his child or children deceased, in equal portions (if more than one), share and share alike ; such issue of any his child or children deceased, to have, receive and take the same share and portion to which his, her, or their parent would have been entitled if living. But if it shall happen that my said son Henry shall depart this life after the decease of my said wife, without leaving lawful issue him surviving, or in case of his death before the decease of my said wife, without leaving lawful issue surviving at the time of her decease, then that they, said Edwin A. Oelrichs, Henry Palmer and Henry Meigs, Jr., the survivors or survivor of them, their successors or successor, in the former case, upon and immediately after the death of my said son Henry, and in the latter case upon and immediately after the death of my said wife, convey, assign, transfer, make over, pay and deliver all such last mentioned one-seventh part of my residuary estate (less the deduction last aforesaid), and the proceeds thereof then remaining, and all the property and rights of property in which the same or any part thereof shall then be invested, and all interest, income, dividend and profits thereof not previously paid and applied in pursuance of the provisions hereinbefore contained, to the wife of my said son Henry at the time of his decease, if such wife there shall be then surviving, and if there shall be no such wife surviving, then to my own right heirs and legal representatives then surviving, in the same manner, shares and proportions in which they would have inherited and been entitled to the same if I had survived my said wife and son Henry, had owned and held said last mentioned one-seventh part in my own name and right at the time of my decease, and had died intestate."

The tenth and eleventh clauses of the will were as follows:

"Tenth. If it shall happen that at the time of the division of my residuary estate into seven shares or parts, as above

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Statement of case.

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provided, the sum and sums of money by me advanced or paid to, for or on account of any one or more of my said children respectively, and charged to or against him or them severally in said book of accounts above mentioned, shall exceed the one-seventh share or part of my said estate, to which such child or children respectively will then be severally entitled, then, and in that case, it is my will, and I do devise, order and direct that the excess of money so advanced, paid and charged to either of my said children, over and beyond said one-seventh share or part of my said estate, shall not be required of or collected from the child or children respectively to or against whom the same shall be so charged, but I do hereby give and bequeath such excess to such child or children respectively, and each of them.

“Eleventh. The better to enable the said Margaret Palmer, Edwin A. Oelrichs, Henry Palmer and Henry Meigs, Jr., the survivor and survivors of them, and their successors or successor, to carry into effect the devises, bequests and directions hereinbefore contained, I do hereby give and grant to them, and such of them as shall at any time be authorized to execute the several trusts hereby created, or any or either of such trusts, full power and authority, at any and all times during the continuance of such trusts respectively, in their discretion, to change the investments of the estate and property by them held in trust, or any part thereof, and for such purpose or otherwise to grant, bargain, sell, convey, mortgage, lease, transfer and make over, as they may deem advisable, all or any parts or part of the real estate or personal property which shall be by them so held in trust, and to make, sign, seal, execute, acknowledge and deliver all and every such deeds, conveyances, mortgages, leases, transfers, agreements, and other instruments in writing as may be necessary or proper therefor.”

The trustees named were appointed executrix and executors of the will.

The wife of the testator died before him, and two of the children named in the will, also died before his decease,

## Statement of case.

unmarried and without issue. No division of the estate into shares was made as directed by the will, but the executors and trustees held the same as one body, dividing the income. In November, 1872, Henry Palmer, the child named in the sixth clause above set forth, died leaving a wife and several children. The contract in question was entered into July 1, 1873, upon an auction sale of a portion of the real estate, of which the testator died seized. Plaintiff paid down, upon entering into the contract, ten per cent of the purchase-price and the auctioneer's fees. The Special Term held that the defendants had no power to convey a full title, such as plaintiff was entitled to, and directed judgment according to the prayer of the complaint. Judgment was entered accordingly.

*John J. Macklin* for the appellants. The whole estate vested in the trustees, subject to the execution of the trusts. (1 R. S., 729, §§ 55, 60.) The devise embraced the rents and profits from the testator's death to the time of the division. (*Rogers v. Ross*, 4 J. Ch., 388.) The trustees were vested with a conditional fee, with a limitation over by way of contingent remainder or executory devise, to such child or children as, upon a division, it would be ascertained were entitled to any interest in the estate. (Fearne on Con. Rem., 17, 19; 1 R. S., 725, § 27; *id.*, 733, § 82; *Vedder v. Evertson*, 3 Paige, 287; *Willington v. Willington*, 1 Bla., 645; 4 Ben., 2165; 1 Greenl. Cruise, 65; 1 Washb., R. P., 63; *Duffield v. Duffield*, 3 Bligh., 340-344.) The interests of the devisees were not vested interests. (1 R. S., 728, § 13; *Elwin v. Elwin*, 8 Ves., 553; *Curtis v. Lukin*, 5 Beav., 147; *Manice v. Manice*, 43 N. Y., 303; Roper on Leg., 560; *Bernard v. Montague*, 1 Meriv., 522; *De Kay v. Irving*, 9 Paige, 521; 5 Den., 649; *Moore v. Littel*, 41 N. Y., 72, 80; 2 Powell on Dev., 251-360; 1 Jarm. on Wills, 797-809; *Phipps v. Williams*, 3 Sim., 44; *Ackerly v. Vernon*, Willes, 153; *Atkins v. Hiccock*, 1 Atk., 500; *Howes v. Herring*, 1 McC. & Y., 292; *Leake v. Robinson*, 2 Meriv., 363, 385; *Ford v. Rawlins*, 1 Sim. & Stu., 328; *Taylor v. Bacon*, 8 Sim., 100;



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*Burns v. Clark*, 37 Barb., 496; *Jackson v. Winne*, 7 W. R., 51; 1 Jarm. on Wills, 762, 771; 1 R. S., 723, § 13; *Newman v. Newman*, 10 Sim., 51; *Festing v. Allen*, 12 M. & W., 279; *Duffield v. Duffield*, 3 Bligh., 260, 333, 341; *Wills v. Wills*, 1 D. & W., 439, 452; *Bull v. Pritchard*, 15 Hare, 567; *Southern v. Wollaston*, 16 Beav., 166; *Boreham v. Bignall*, 8 Hare, 131; *Vawdry v. Geddes*, 1 R. & M., 203.) Assuming that the trusts, so far as Henry Palmer's children are concerned, had terminated, and that the interests had vested, the power of division may now be exercised. (*Hawley v. James*, 5 Paige, 548; *Manice v. Manice*, 43 N. Y., 303, 364; *Downing v. Marshall*, 1 Abb. Ct. App. Dec., 543; *Tate v. Swinstead*, 26 Beav., 525; *Wood v. White*, 4 Myl. & C., 460; *Trower v. Knightley*, 6 Mad., 134; *Kinnier v. Rogers*, 42 N. Y., 531; *Skinner v. Quin*, 43 id., 99; *Crittenden v. Fairchild*, 41 id., 289.) The court will construe liberally powers of division and sale in executors. (*Pearce v. Gardner*, 10 Hare, 387; *Hutchins v. Baldwin*, 7 Bosw., 236.) If a division can now be made, the power of sale may be executed and a valid title given. (*Egerton v. Conklin*, 25 W. R., 238; *Pearce v. Gardner*, 10 Hare, 287; 1 Sugd. on Powers, 334; 2 id., 463; *Morton v. Morton*, 8 Barb., 18; *Dorland v. Dorland*, 2 id., 63; *Bogert v. Hertell*, 4 Hill, 492; *Davone v. Fanning*, 2 J. Ch., 252.)

*Osborn E. Bright* for the respondent. The trust as to the share of Henry Palmer terminated on his death, and no division of the estate having been made, his heirs became seized of an undivided seventh part. (*Wood v. White*, 2 Keen., 664; 4 Myl. & C., 460; *Wolley v. Jenkins*, 23 Beav., 53.) The long neglect to divide the estate could not prevent the vesting of the interest of the remaindermen. (*Gaskell v. Harman*, 11 Ves., 507; *Bernard v. Montague*, 1 Meriv., 433; *Small v. Wing*, 5 Bro. P. C., 503; Tomlin's ed., 66.) The division of the estate into shares and the incidental ascertaining of the accounts are not in the nature of a condition precedent. (2 Powell on Devises, 261; *Cary v. Bertie*, 2 Vern., 340;



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Opinion of the Court, per ALLEN, J.

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*Phipps v. Williams*, 5 Sim., 44; *Elton v. Elton*, 1 Wils., 159.) The power of sale was consistent with the testator's intention that the trustees should make an immediate division of his estate, and that the land embraced in each share should, on the death of the tenant for life, go to his issue in fee. (*Crittenden v. Fairchild*, 41 N. Y., 289; *Kinnier v. Rogers*, 42 id., 531; *Skinner v. Quin*, 43 id., 99.)

ALLEN, J. As a suit in equity to rescind an agreement for the sale of real estate by reason of a defect in the title or a want of power to sell in the vendors, the action could not be maintained. The plaintiff having a perfect defence at law and in equity in any action which might be brought to enforce the agreement, an action by him to rescind it would be unnecessary. But, as an action to recover money paid upon a consideration that has failed, this action can be sustained if the title of the defendants is not such as the plaintiff is bound to accept. The power of the defendants to make the sale and convey the property, the subject of the sale, is derived from the will of John J. Palmer, and depends upon the interpretation of that instrument. At the time of the making of the will the wife and seven children of the testator were living; the wife and two of the children died during the lifetime of the testator, the children dying unmarried and without issue; another of the children, Henry Palmer, died several years after the testator, leaving him surviving a wife and several children. By the will a valid trust was created in the executors of the entire estate for the benefit of the wife during her life. As that trust never took effect, by reason of the death of the wife, it need not be farther noticed. A valid several trust was also created for each of the seven children in one-seventh part of the residue of the estate, real and personal, which took effect in respect to each of the children living at the death of the testator, as to the one-seventh set apart for them respectively. The two-sevenths designed for the two sons that died before the testator, went directly upon the death of the latter to their right heirs, pursuant to the

directions of the will, and did not go to the executors in trust for any purpose. The trusts for the children were necessarily several to avoid a conflict with the statute against perpetuities, and the trust in each share or portion was created by a distinct clause of the will for the child named as the beneficiary therein, and was to continue during the life of that child and no longer. The trust being for the leasing of real property, the collection of rents, the investment of the personal estate, the receipt of the income, and the paying and applying the rents and income to the use of the beneficiary for life, an estate was vested in the executors and trustees during the continuance of the trust. That trust ceased with the life of the person for whose benefit the rents and income of the estate were to be applied. The power and direction to transfer and convey the share or portion of the estate to those entitled under the will after the death of the *cestui que trust* for life did not constitute a trust, or require the estate to be vested in the executors and trustees named. It was merely a power in trust and could be executed as such. The estate and interest of those entitled in remainder did not depend upon the execution of that power, and the vesting of their estate could neither be defeated nor delayed by the neglects or omissions of those vested with the power. (*Manice v. Manice*, 43 N. Y., 303; *Skinner v. Quin*, id., 99.) The power of the defendants, as executors and trustees under the will, to sell, is in terms restricted and limited in point of time to the continuance of the respective trusts, and in respect to property to such as is held by them in trust. In the words of the will, the testator gives to them "full power and authority at any and all times during the continuance of such trusts, respectively, in their discretion, to change the investments of the estate and property by them held in trust or any part thereof, and for such purpose or otherwise to grant, bargain, sell, convey, mortgage, lease, transfer and make over as they may deem advisable, all or any parts or part of the real estate or personal property which shall be by them so held in trust." The power is not only in terms restricted to the property

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Opinion of the Court, per ALLEN, J.

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held in trust, but was designed to enable the trustees during the continuance of the respective trusts to change the investments, with a view to increase the fund and the income to be derived from it. It is a several power in respect to the property held under the respective trusts, and not a general power embracing the whole estate, and to be exercised so long as any one of the trusts continues, or until a final partition of the estate is made. At the time of the sale to the plaintiff, the trust in respect to the one-seventh devised to Henry Palmer had ceased, and that one-seventh of the estate had vested in his children. Over that portion of the estate the defendants had no power except the naked power to convey to those entitled in remainder. Their power of sale had terminated. (*Wood v. White*, 2 Keen., 664; S. C., 4 M. & C., 460.) The will does not confer upon the executors a power of sale with a view to a distribution among the remaindermen, or in order to give to those entitled their shares upon the death of any one of the *cestuis que trust* for life, as the successors in interest of such *cestui que trust*. The direction in the will to ascertain the advancements for the several children, and deduct the amount from their respective shares did not delay or defer the time at which the estate should be divided into shares as directed, or continue or extend the trusts or the trust estate in the defendants. It is not denied that the children of Henry Palmer, the deceased's son, have succeeded to some share or portion of the estate under the will, and whether the same was a full one-seventh or less is unimportant. It was an undivided interest in the real property, including that sold to the plaintiff. It cannot be assumed in the absence of proof that any deduction was to be made from any particular share, still less that the advances made and to be deducted absorbed the entire share. But in no case could the dilatory dealing by the trustees with the estate affect third persons or those entitled in remainder.

The judgment must be affirmed.

All concur.

Judgment affirmed.

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Statement of case.

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DEBORAH C. BECAR, Respondent, v. EBERHARD FLUES, Executor, etc., Appellant.

A parol lease of premises for a year to commence *in futuro* is not an executory contract prior to the time of taking possession. It vests a present interest in the term and cannot be rescinded by either party alone.

In case, therefore, of a refusal of the lessee to perform, the lessor is not required to lease to another if he have an opportunity, and is not confined to his remedy for actual damages; but may refuse to accept the rescission and hold the lessee liable for the rent.

(Submitted March 23, 1876; decided April 4, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department affirming a judgment in favor of plaintiff, entered upon a verdict.

This action was brought upon an alleged parol lease by plaintiff to defendant's testator of certain premises in Brooklyn. Said testator went into possession of the premises in 1871 under a written lease, which expired May 1, 1874. In February or March, 1874, a verbal contract was entered into for another year. The testator died April 10, 1874, and soon after defendant gave notice that he rescinded the contract, and that the premises would be vacated May 1, 1874. They were so vacated, and the key tendered and left at the office of plaintiff's agent, who returned it to defendant by mail. Defendant offered to prove on the trial that plaintiff, after defendant's notice and before May 1, 1875, was offered \$1,200 for the premises, for the year, and refused it. The offer was rejected, and defendant's counsel duly excepted. The rent agreed to be paid was \$1,400. The court directed a verdict for the plaintiff for three-quarters' rent due under the contract. Defendant's counsel duly excepted. A verdict was rendered accordingly.

Wm. W. Badger for the appellant. The lease was terminated by defendant's notice rescinding it, and he was only

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Opinion of the Court, per CHURCH, Ch. J.

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liable for such damages and loss as plaintiff had suffered by reason of the rescinding of the contract, and plaintiff was bound to save defendant as far as he could from further damage. (*Hecker v. McCrea*, 24 Wend., 310; *Hamilton v. McPherson*, 28 N. Y., 72, 77; *Miller v. Mariners' Church*, 7 Greenl., 51; *Shannon v. Comstock*, 21 Wend., 461; *Clark v. Marsiglia*, 1 Den., 317; *Spencer v. Halstead*, id., 606; *Wilson v. Martin*, id., 602-605; *Loker v. Damon*, 17 Pick., 284; *Dillon v. Anderson*, 43 N. Y., 237; *Miller v. Pres't, etc.*, 41 id., 100-103; *Litchfield v. Johnson*, 1 Swe., 459; *Terwilliger v. Knapp*, 2 E. D. S., 86-88; *La Furge v. Mansfield*, 31 Barb., 345-347; *Skinner v. Tinker*, 34 id., 333; *Hosmer v. Wilson*, 7 Mich., 294; *Danforth v. Walker*, 37 Vt., 239; Sedg. on Dam. [6th ed.], 106, 265, 266.)

*E. More* for the respondent. The lease was not an executory contract, which one party could break and limit the other to his remedy for damages. (*Clark v. Marsiglia*, 1 Den., 317; *Wilson v. Martin*, id., 602; *Spencer v. Halsted*, id., 606.)

CHURCH, Ch. J. From the facts disclosed in this case, the loss occasioned by not renting the premises, by either of the parties, was unnecessary. The evidence tends to establish that the defendant's testator, in February or March, 1874, leased the premises by parol of the plaintiff, by her son, for one year from the first of May thereafter, the testator then being in possession under a prior lease. The testator died in April, and the family not desiring to retain the house, the defendant gave notice that they would not retain it, and on the first of May they abandoned the possession and tendered the key, which was declined. This action is brought for three-quarters' rent.

The defendant proved that the plaintiff might have rented the house for nearly as much as the defendant's testator was to pay for the same. A verdict was directed for the plaintiff. It is claimed by the defendant that between the making of the contract and the time for taking possession the contract

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Opinion of the Court, per CHURCH, Ch. J.

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was executory, and that the defendant having refused to perform it, the plaintiff could only recover the actual damages, which, within the general rule, the plaintiff was bound to make as small as possible. (28 N. Y., 72; 43 id., 237.) While the rule of law invoked is well settled, I feel constrained to hold that it is not applicable to this contract. The error is in the position that this was an executory contract. This court decided, in *Young v. Dake* (5 N. Y., 463), that a parol lease for a year, to commence *in futuro*, is valid and obligatory. Such a lease vests a present interest in the term. It is assignable before entry, and the lessee can bring ejectment if possession is withheld. (*Whitney v. Allaire*, 1 N. Y., 307, and authorities cited.) The same principle was recognized in *Trull v. Granger* (8 N. Y., 115). It was there held that although ejectment would lie, the tenant might also bring an action for damages upon the implied agreement to give possession, or in tort for a violation of duty. If the landlord could not rescind, the tenant could not. The rights and liabilities in this respect are mutual. Each party acted upon their strict legal rights, and while the result we can see will operate harshly upon the defendant and the estate, we are compelled to adjudge the law as we find it. When the plaintiff refused to accept the rescission, the defendant still held the term, and was responsible for the rent of the house. The lease, although verbal, is as binding as if in writing. It granted *in presenti* a term of one year in the premises, which the testator agreed to pay for. It is like the sale of specific personal property to be delivered. In such a case the title passes to the vendee, and of course he is liable for the purchase-money.

I have examined the other points made, and do not think any of them tenable. No question was made in this court as to the propriety of allowing costs.

The judgment must be affirmed.

All concur.

Judgment affirmed.

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Statement of case.

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JOHN B. SCHOLEY, Executor, etc., Respondent, v. ANNE E. MUMFORD, Survivor, etc., Appellant.

Plaintiff's complaint alleged, in substance, that certain bonds belonging to the estate of S., of whose will he was surviving executor, came into defendant's hands as the personal representative of M., a deceased executor, which they refused to deliver up unless plaintiff would pay an unjust claim for commissions, which was disputed by plaintiff, but which he paid in order to obtain the bonds. Defendant's answer alleged, among other things, that an account containing charges for the commissions claimed was delivered to plaintiff at his request, examined by him and admitted to be correct. This allegation, after plaintiff had given evidence that he had always disputed the claim, defendants offered to prove on trial. The offer was rejected. *Held*, error; that the averment in the complaint that the claim was unjust and was disputed was necessary in order to show that the payment was involuntary; and it being put in issue, defendant was entitled to the evidence offered as relevant to that issue.

(Argued March 28, 1876; decided April 4, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported on a former appeal, 60 N. Y., 498.)

The complaint in this action alleged, in substance, that plaintiff and George H. Mumford were the executors of the will of Elizabeth G. Scholey, deceased; that said Mumford died, having in his possession a large amount of United States bonds belonging to the estate, which came into the hands of defendants as his personal representatives; that plaintiff demanded the same, but they refused to deliver them up until certain commissions alleged to be due and owing to the estate of said Mumford, to wit, one-half per cent on the value of the bonds, were paid, which claim was unjust and was disputed by plaintiff, and that plaintiff paid the same in order to obtain possession of the bonds; that he subsequently demanded a return of the money so paid, which was

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Opinion of the Court, per RAPALLO, J.

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refused. Defendant's answer denied that they refused to deliver up the bonds, and alleged in substance that they offered to deliver up the bonds upon being paid their claim for commissions and advances; that plaintiff requested them to make out their account therefor, which they did, and it was delivered to and examined by plaintiff, and admitted to be correct, and plaintiff paid the same, and defendants delivered up the bonds; that if the matter had not been thus settled and arranged with plaintiff's free and voluntary consent they would not have delivered up the bonds until the final settlement of the accounts of said Mumford as executor.

Upon the trial evidence was given by plaintiff, among other things, that he had always disputed the claim for commissions. Defendants offered to prove that they never imposed as a condition for the surrender of the bonds the payment of the money by plaintiff. This was objected to by plaintiff's counsel as inconsistent with the answer, and the offer was excluded, to which defendants' counsel duly excepted. Defendants' counsel also offered to prove the allegations of the answer as to the presentation of the account and the admissions as to its correctness by plaintiff. The court excluded the offer, and defendants' counsel duly excepted. The court directed a verdict for plaintiff, to which said counsel also duly excepted. A verdict was rendered accordingly.

*Geo. F. Danforth* for the appellant. It was error to reject defendants' offer to prove that an account containing charges for the commissions had been delivered to plaintiff at his request, and that he had examined it and admitted it to be correct. (*Wyman v. Farnsworth*, 3 Barb., 369; *Suprs. Onondaga v. Briggs*, 2 Den., 39; *Mowatt v. Wright*, 1 Wend., 355; *Knibbs v. Hall*, 1 Esp., 84; *Hall v. Shultz*, 4 J. R., 245; *Harmony v. Bingham*, 12 N. Y., 111.)

*F. A. Macomber* for the respondent.

RAPALLO, J. After having given due consideration to the argument of the learned counsel for the appellant as to the



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construction of the answer, we remain of the opinion that it admits that the payment of the amount stated in the account rendered for commissions and advances, was required as a condition for the delivery of the bonds to the plaintiff. The offer to prove that the defendants never imposed as a condition for the surrender of the bonds the payment of any money by the plaintiff, was therefore properly rejected.

But the answer contains the further allegation that the account of the commissions and advances claimed by the defendants, was delivered to and examined by the plaintiff and admitted to be correct. This allegation the defendants offered to prove, and the offer was rejected. The complaint averred that among the commissions claimed was the sum of \$474.77, being one-half per cent on the value of the bonds; that the claim was unjust and was disputed by the plaintiff. This was a necessary averment to show that the payment was involuntary, and it was expressly denied by the answer. On the first trial as well as upon the last, evidence was adduced by the plaintiff in support of the allegation that he always disputed the claim for these commissions. This was one of the issues in the case, and we think the court erred in refusing to permit the defendants to introduce evidence bearing upon it.

We have examined the other exceptions taken and find no error in the rulings of the court, save in the respect before mentioned. But if the appellant desires a new trial upon the issue whether the claim for these commissions was disputed or admitted by the plaintiff, she is entitled to it.

The judgment should be reversed and new a trial ordered, costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

JULIA ANN MASSOTH, Administratrix, etc., Respondent, v.  
THE PRESIDENT, MANAGERS AND COMPANY OF THE DELA-  
WARE AND HUDSON CANAL COMPANY, Appellant.

In an action to recover damages for the alleged negligent killing of plain-  
tiff's intestate at a railroad crossing, the evidence showed that there  
were obstacles intercepting the view of the track from the highway  
upon which the deceased was approaching the crossing; and S., the  
employer of the deceased, who was in the wagon with him and was  
driving, testified that he looked in both directions and did not see the  
approaching train, which was moving very rapidly. Defendant's testi-  
mony tended to show that from a point on the highway, 150 or 160 feet  
from the track, a train could have been seen for some distance. Defend-  
ant's counsel requested the court to charge that there being no evidence  
affirmatively showing that the deceased either looked or listened or did  
any thing to guard against the dangers of the crossing, it was to be pre-  
sumed that he did not look and was negligent. The request was  
refused. *Held*, no error; that the presumption was simply one of fact,  
and that the question of contributory negligence was properly left to  
the jury.

*Wilcox v. R. and W. R. R. Co.* (39 N. Y., 358) distinguished.

It does not necessarily follow from the fact that a skilled engineer can  
demonstrate that, from a given point in a highway, the track of a rail-  
road is visible for any distance; that an individual in charge of a team  
approaching the track is negligent because from the point specified he  
does not see a train approaching at great speed in time to avoid a  
collision.

As to whether, in such a case, a servant riding with his master, who is  
driving, is chargeable with his master's negligence, *quære*.

Irrespective of any ordinance or law regulating the speed of railroad  
trains at crossings, the running at an excessive rate of speed is negli-  
gence, and if a collision is caused thereby, the company is liable. As  
to whether the rate of speed is excessive or dangerous in the locality, is  
a question of fact for the jury.

Whether the violation of a municipal ordinance regulating the rate of  
speed is, as matter of law, negligence, *quære*.

An expression of opinion in a charge to a jury as to a question of fact,  
however decided, is not the ground of an exception, if no direction is  
given to the jury to find in accordance with such opinion, and the ques-  
tion is fairly left to them to decide upon their own judgment.

(Argued March 23, 1876; decided April 4, 1876.)

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Statement of case.

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APPEAL from judgment of the General Term of the Supreme Court in the third judicial department affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 6 Hun, 314.)

This action was brought to recover damages for the alleged killing of plaintiff's intestate, Adam Massoth.

The accident occurred September 4, 1874, at a point where a street in the city of Cohoes crosses defendant's tracks. The street crosses the railroad diagonally. The deceased, who was in the employ of one Cornell Smith, was struck while riding on a load of hay with his employer, going south-easterly on said street; the latter was driving. He testified that he looked both ways as he approached the crossing, and saw no train; that he listened also for the bell or whistle, but he heard none. As he came near the crossing his horses sprang forward suddenly. He tried to check them, but could not, and as they reached the track the wagon was struck by a train from the north. Plaintiff's evidence tended to show that the train was moving at a very rapid and unusual rate of speed, variously estimated at from fifteen to twenty-five miles per hour. It appeared that there were buildings along the street near the crossing, obstructing the view. Plaintiff gave in evidence a city ordinance prohibiting the running of trains through, upon or across any of the streets of the city at a greater rate of speed than eight miles an hour. A civil engineer in defendant's employ was called as a witness in its behalf. He testified, in substance, that the first house, on the east side of Main street, north-east of the crossing, was 210 feet from the crossing and about thirty-five feet from the railroad, and then other buildings along, with spaces between where glimpses of the track could be obtained, and that passing down Main street toward the crossing at a point 158 feet therefrom he could see up the track north for 2,000 feet.

The defendant's counsel asked the court to charge, among other things, that in the absence of evidence that Massoth looked when they neared the crossing to see whether a train was approaching, it was to be presumed that he did not.

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Statement of case.

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The court refused so to charge and said counsel duly excepted.

The court charged among other things as follows: "The first question then is, has the defendant been guilty of negligence? It is claimed on the part of the plaintiff that it was guilty of negligence, and mainly upon this ground. By means of this State chartering the city of Cohoes, it is authorized to pass ordinances regulating the speed of trains while passing through the city. In pursuance of the power given them by their charter, the corporation of the city of Cohoes passed an ordinance forbidding the running of trains at a greater rate of speed than eight miles an hour through the city. [As I understand the evidence in this cause, while there is some dispute as to the exact rate of speed those cars were running when they passed through, there is no difference in that they were running at a greater rate of speed than eight miles an hour. Witnesses on the part of the plaintiff, state that the speed was from fifteen to twenty, and I think one going as high as twenty-five miles an hour; while the witnesses on the part of the defence say they were running at the rate of from eight to ten miles an hour. While if this train were running over eight miles an hour, it was running at a greater rate of speed than it was authorized to run through the city, therefore it is evidence to be submitted to you that the company was negligent.] The amount or rate of speed may be somewhat important in discussing another branch of the case—upon the question whether the defendant has been guilty of negligence or not. [As I understand the evidence on the part of the defence, it confesses or admits that the rate of speed was greater than that which the ordinance of the city of Cohoes permitted. Submitting this to you, then, as a question of fact to be found by you, I submit to you that it seems fair to say that the company has been guilty of negligence.] \* \* \* ["There are a number of witnesses who have testified that the bell was rung and the whistle sounded, but this question is of less importance in this case, inasmuch as it is enough to find the company guilty of negligence if running at a greater

## Statement of case.

rate of speed than eight miles an hour. And as I understand the evidence on both sides it is a conceded fact that this train was running at a greater speed than eight miles an hour, which was the speed fixed by the ordinance. So upon the question of the company's negligence, I think you will have no difficulty, though it is left as a question of fact for you." Defendant's counsel duly excepted to those portions of the charge in brackets. Further facts appear in the opinion.

*Henry Smith* for the appellant. As there was no evidence that deceased either looked or listened, or that he did any thing to guard against the dangers of the crossing, it will be presumed that he did nothing. (*Wilcox v. R. and W. R. R. Co.*, 39 N. Y., 358.) The driver had no right to assume that the train would be run at a rate of speed in obedience to the city ordinance. (*Calligan v. N. Y. C. and H. R. R. R. Co.*, 59 N. Y., 651.) Both Massoth and Smith were guilty of negligence. (*Wilds v. H. R. R. R. Co.*, 29 N. Y., 325; *Baxter v. T. and B. R. R. Co.*, 41 id., 503; *McCall v. N. Y. C. R. R. Co.*, 54 id., 642; *Grippen v. N. Y. C. R. R. Co.*, 40 id., 44; *Havens v. Erie R. Co.*, 41 id., 296; *Wilcox v. R. and W. R. R. Co.*, 39 id., 358; *Beiseigel v. N. Y. C. R. R. Co.*, 14 Abb. [N. S.], 32; *Reynold v. N. Y. C. R. R. Co.*, 58 N. Y., 248; *Weber v. N. Y. C. R. R. Co.*, id., 451; *Gorton v. Erie R. Co.*, 45 id., 660.) The judge erred in charging the jury, that if defendant ran its train at a greater rate of speed than allowed by the city ordinance it was negligence *per se*. (*Brown v. B. and S. L. R. R. Co.*, 22 N. Y., 191, 198; *Cook v. N. Y. C. R. R. Co.*, 5 Lans., 404; *Beiseigel v. N. Y. C. R. R. Co.*, 14 Abb. [N. S.], 35; *Jelter v. N. Y. and H. R. R. Co.*, 2 Keyes, 154; *McGrath v. N. Y. C. and H. R. R. R. Co.*, MSS. op. Ct. Apps.; *Allis v. Leonard*, 58 N. Y., 288.) It was error to charge the jury that in the absence of any evidence upon the subject it was to be presumed that Massoth did not look out for the train. (*Wilcox v. R. and W. R. R. Co.*, 39 N. Y., 358; *Potter v. Chadsey*, 16 Abb. Pr., 146.)

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Opinion of the Court, per ALLEN, J.

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*Amasa J. Parker* for the respondent. The city ordinance, as to the speed of trains, was obligatory upon defendant, and it was negligence to disregard it. (*Beiseigel v. N. Y. C. R. R. Co.*, 14 Abb. Pr. [N. S.], 29; *Telter v. Harlem R. R. Co.*, 2 Abb. Ct. App. Dec., 458; 111 Mass., 136; *McGrath v. N. Y. C. R. R. Co.*, MSS. op. Ct. Apps.; *N. Y. Ins. Co. v. Walden*, 12 J. R., 519; 5 N. Y., 160; *Stettiner v. Granite Co.*, 5 Duer., 599; *Althof v. Wolf*, 2 Hilt., 345; *Bruce v. Westervelt*, 2 E. D. S., 441.) Whether the deceased was guilty of contributory negligence was a question of fact. (*Beiseigel v. N. Y. C. R. R. Co.*, 34 N. Y., 624; 47 id., 402; 46 Barb., 270; 18 How. Pr., 165; 19 N. Y., 341; 32 id., 601; *Filer v. N. Y. C. R. R. Co.*, 49 id., 47; *Weber v. N. Y. C. R. R. Co.*, 58 id., 451; *Hackford v. N. Y. C. R. R. Co.*, 53 id., 654; *Spooner v. Bklyn. City R. R. Co.*, 54 id., 730; *Acker v. Lansing*, 48 How. Pr., 384; *Mowry v. Cent. City*, 8 Alb. L. J., 125; *Sheehan v. Edgar*, id., 189; *Sherwood v. Merc. Co.*, 5 Hun, 115.) The driver had a right to suppose the train would not run faster than the limit allowed by law. (*Weber v. N. Y. C. R. R. Co.*, 58 N. Y., 451; *Jelter v. N. Y. C. R. R. Co.*, 2 Abb. Ct. App. Dec., 462.)

ALLEN, J. The instructions of the learned judge to the jury, in respect to the effect of the negligence of the intestate, or of Smith, his employer, contributing to the accident, were quite as favorable to the defendant as could be claimed in its behalf. The charge was very distinct, not only that any neglect of the deceased in looking for and avoiding collision with the cars of the defendant would defeat the action, but that the neglect and omission of Smith, the owner and driver of the team, in whose service the deceased was at the time, would have the like effect; that both were bound to see, if they could, the approaching train; that they were bound to look, and if by looking they could have seen the approaching train, they were bound to stop before reaching the track. The charge was, that the negligence of Smith was attributa-

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Opinion of the Court, per ALLEN, J.

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ble to the deceased, under the circumstances of the case, and that any negligence upon his part, which contributed to the injury, would defeat the present action as effectually as would like negligence upon the part of the deceased. Of these instructions the defendant had no right to complain. Were it necessary to pass upon the question, I should hesitate, as did the learned judge upon the trial, in holding that the consequence of Smith's negligence could be visited upon the plaintiff and defeat the action, but it is not necessary to consider it.

The question of contributory negligence in cases of this character is ordinarily one of fact for the jury. It depends usually upon a variety of circumstances, and upon inferences from the facts proved, calling for the exercise of practical knowledge and experience, and is peculiarly within the province of a jury of twelve men. It is only where it clearly appears from all the circumstances, or is proved by uncontroverted evidence, that the party injured has, by his own acts or neglect, contributed to the injury, that the court can take the case from the jury and nonsuit the plaintiff. (*Lane v. The Atlantic Works*, 111 Mass., 136; *Weber v. The N. Y. C. and H. R. R. R. Co.*, 58 N. Y., 451; *Davis v. The Same*, 47 id., 400; *Hackford v. The Same*, 53 id., 654.) The instances in which nonsuits have been sustained by reason of the contributory negligence of the plaintiff, or the party sustaining injury, have been exceptional cases in which the court has adjudged that such negligence was conclusively established by evidence which left nothing, either of inference or of fact, in doubt or to be settled by a jury. (*Reynolds v. N. Y. C. and H. R. R. R. Co.*, 58 N. Y., 248; *Gorton v. The Erie R. Co.*, 45 id., 660.) The judge properly refused to charge as requested, that there being no evidence affirmatively showing that the deceased either looked or listened, or did any thing to guard against the dangers of the crossing, it was to be presumed that he did not look and was negligent. The case of *Wilcox v. The Rome and Watertown Railroad Company* (39 N. Y., 358), relied upon by the appellant's counsel to



sustain his exception to this refusal, only decides that, under the circumstances of that case, it was a fair and reasonable presumption of fact that the plaintiff did not look. The circumstances of this case are entirely unlike those in the case cited. Here there were obstacles to intercept the view of the track from the highway upon which the deceased was approaching it, and his companion and employer, Smith, testified that he (Smith) did look in both directions and did not see the approaching train. While the jury might have inferred that the deceased had not looked as he might have done for the approach of passing trains, it would have been error to hold that a legal presumption arose that the deceased did not so look, as is the duty of all when approaching railroad crossings, and had thus been conclusively shown to have been guilty of negligence contributing to the injury. Although there was proof tending to show that, from a point in the highway some 150 or 160 feet from the railroad track, an approaching train could have been seen for some distance, yet the jury, in connection with this fact, had evidence of the rate of speed at which this particular train approached the crossing, of the several buildings which obstructed the view of the track up to the point suggested, and that Smith, who was driving the team, did look up and down the track and saw no train, and heard no signal or sound of an approaching train; and they also had the evidence of the manner in which Smith, with his team, approached the track, and the effort that was made to control the team and to avoid a collision; and upon the circumstances and facts proved, and all the evidence, it was clearly for the jury to determine whether the collision and consequent injury was caused solely by the neglect or wrongful act of the defendant and its servants in charge of the train. It does not necessarily follow from the fact that a skilled engineer can demonstrate that from a given point in a highway the track of a railroad is visible for any distance, that an individual in charge of a team approaching the track is negligent because he does not from the same point see a train, approaching at great speed, in time to avoid



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a collision; and it is not enough to disturb a verdict of a jury in this court, in which legal errors only can be corrected, that the questions of fact are doubtful and that a different result might have been reached. There was no error in the refusal to nonsuit on account of the alleged contributory negligence of the deceased or Smith, his employer.

The remaining question to be considered arises upon several exceptions to the instructions of the learned judge in respect to the negligence of the defendant, and his comments upon the evidence touching that part of the case. The negligence upon which reliance was placed by the plaintiff, and upon which we may assume that the verdict passed against the defendant, was the rate of speed at which the train was moving at and before the time of the collision. Irrespective of any ordinance or law regulating the speed of railroad trains, it was a question of fact whether the rate was excessive or dangerous in that locality, and if so found by the jury, and such excessive rate of speed caused the collision, the defendant was liable for the consequences. (*Wilds v. H. R. R. Co.*, 29 N. Y., 315.) By an ordinance of the city of Cohoes, the validity and binding authority of which is not questioned, the defendant was prohibited from running its trains within the city limits "at a greater rate of speed than eight miles an hour." The evidence is very satisfactory that this particular train was running at a much greater rate of speed than that permitted by the ordinance. Whether a violation of this ordinance is necessarily an act of negligence, or such a wrongful act in violation of law as legally to charge the defendant with any injuries resulting from such act, may be regarded as an open question in this State. The decision in *Brown v. The Buffalo and State Line Railroad Company* (22 N. Y., 191) that a city ordinance regulating the speed of railroad trains was not admissible in evidence, for any purpose, in an action against a railroad corporation for negligently causing the death of an individual, was dissented from by Judges SELDEN, DENIO and CLERKE, and has been overruled. (*Jetter v. N. Y. and H. R. R. Co.*, 2 Abb. Ct. of App.,

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458; S. C., 2 Keyes, 154; *Beiseigel v. N. Y. C. R. R. Co.*, 14 Abb. [N. S.], 29.) The actual decisions in this State have, however, only gone to the extent of holding that city ordinances of this character are competent evidence upon the question of negligence of railroad corporations, and with proof of a greater rate of speed than that prescribed, proper, with all the other evidence in the case, to be submitted to the jury for their consideration.' It has not been necessary in any case, in which the question has arisen, for the courts to go farther. In *Jetter v. New York and Harlem Railroad Company* (*supra*), there is a plain intimation that a municipal ordinance, passed by authority of the legislature, has the force of an express statute, and that every violator of it is a wrongdoer, and *ex necessitate*, negligent in the eye of the law, and that every innocent party injured by such violation is entitled to his civil remedy for such injury. This would make railroad corporations liable to the same extent for a disregard of a city ordinance regulating the rate of speed of trains, as for an omission of the statutory signals of sounding the whistles or ringing the bell at highway crossings. It is said in the same case that every man has a right to assume that others will obey the law, and not bring injury upon him by its violation. (See also, *Newson v. N. Y. Central Railroad Co.*, 29 N. Y., 283.) Judge GROVER, in *Beiseigel's Case* (*supra*), in an opinion concurred in by all the members of this court, took the same view of the legal effect of a city ordinance upon the civil rights of the parties. In *Lane v. Atlantic Works* (*supra*), the jury were charged that a city ordinance forbidding the leaving of trucks in the street was proper to be considered by them upon the question of negligence, although not conclusive proof that the defendants were in point of fact negligent; that it was a matter of evidence, to be weighed with all the other evidence in the case. Upon an exception by the defendant to this ruling, the court in banc merely say: "This was sufficiently favorable to the defendants." In *McGrath v. New York Central and*

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*Hudson River Railroad Company*,\* recently decided and not yet reported, the same view is taken of the effect of an ordinance as did the judge upon the trial in the case last cited; but the judgment in the case did not necessarily decide that point; and, as before suggested, it must be regarded as an open question with us.

The dicta in the several cases in this court may be referred to the manner in which in each case the precise question involved was made, rather than as intended, as a committal on the main question. In Maryland it is held that, if a railroad company does not conform to city ordinances, providing certain safeguards in the use of its engines, it is not in the lawful pursuit of its business, and is responsible for any injury which it may occasion if the party injured be not in fault. (*Baltimore and Ohio Railroad v. The State*, 29 Md., 252.)

Within all the cases, if the judge merely submitted the ordinance in connection with the other evidence to the jury for their consideration, leaving it to them to give such effect to it as bearing upon the question of negligence as they should, under all the circumstances, deem it entitled to, there was clearly no error, and the exceptions to the charge and the comments of the judge upon the subject, are untenable. Whether he did more than this depends upon the interpretation of the instructions given. If the learned judge in his comments to the jury merely expressed his opinion in respect to the question of fact involved, and did not direct the jury to find in accordance with such opinion, but fairly left it to them to decide upon their own judgment, there was no error. A judge may, in submitting questions of fact to a jury, give his own impressions of the effect of the evidence and such impressions will not be the subject of an exception if the jury are given to understand that they are the judges who are to determine the facts upon their views of the evidence. A direction to the jury may be the subject-matter of an exception; the expression of a mere opinion is not. (*N. Y. Fire-*

\* 68 N. Y., 522.

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Opinion of the Court, per ALLEN, J.

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*man Ins. Co. v. Walden*, 12 J. R., 513; *Adams v. Rice*, 1 Seld., 155; *Ellis v. Leonard*, 58 N. Y., 288.) It cannot be denied that the comments of the learned judge upon the effect of the ordinance in connection with proof of the rate of speed at which the train moved, as evidence of negligence on the part of the defendant, was upon the very verge of the line which separates the expression of a mere opinion from an actual decision and positive direction. To say the least, the expressions of opinion were very decided, and, without being in terms a positive direction, were liable to be misunderstood; and, but for the declaration at the commencement and at the close of his comments upon this branch of the case, might possibly be regarded as an instruction to the jury that the defendant, by running the train at a rate of speed in excess of that permitted by the ordinance was, *ex necessitate*, negligent, and liable for the injuries resulting from that act, if the party injured was without fault. But he does not, in terms, so declare, and direct the jury to find the fact accordingly; and at the commencement of his remarks upon this part of the evidence, he expressly says to the jury that the evidence was submitted to them, that the company was negligent; *i. e.*, that the evidence was legitimate, as tending to prove negligence, and was to be considered by them. If he had intended to decide it as matter of law the evidence would not have been submitted to the jury for any purpose. Again, he says: "Submitting this to you, then as a question of fact, to be found by you, I submit to you that it seems fair to say that the company has been guilty of negligence;" an expression of opinion and a submission of the question coming far short of a direction. In concluding his comments upon the evidence as to the defendant's negligence he, in terms, expresses the opinion that the jury will have no difficulty, adding, however, as the final proposition, "though it is left as a question of fact for you." Reading the whole charge together, including the isolated remarks excepted to, it seems very clear that the judge did give the jury to understand that the question of negligence on the part of the defendant was

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Statement of case.

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submitted to them for their decision. This being so, and the city ordinance being submitted to them with the other evidence as bearing upon that question, but not as conclusive, there was no error in the parts of the charge excepted to; and it is not necessary to decide or intimate as to whether further effect might or might not have been given to the ordinance, and a violation of it as affecting the civil rights of parties injured by such violation.

The judgment must be affirmed.

All concur; CHURCH, Ch. J., concurring in result.

Judgment affirmed.

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| 64  | 535 |
| 133 | 532 |

NANCY CORDELL, Administratrix, etc., Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Although a highway crossing a railroad track has been regularly laid out, yet until it has been actually opened or notice "of such laying out" has been served upon an officer of the railroad corporation named in and as required by the act of 1853 (chap. 62, Laws of 1853), the duty imposed by the general railroad act, as amended in 1854 (§ 7, chap. 282, Laws of 1854), of ringing a bell or sounding a whistle upon a train approaching the crossing, does not attach; the highway is not "a traveled public road or street" within the meaning of said last-mentioned act.

Ordinary care and prudence may require the giving of signals from an approaching train, to warn persons lawfully upon the track, and the omission to do so when so required will subject the corporation to liability for injury caused by the omission; but unless it is at a highway crossing in respect to which the statutory duty exists, the omission to give the designated signals is not negligence as matter of law, but the question of negligence is one of fact for a jury.

*Cordell v. N. Y. C. and H. R. R. Co.* (6 Hun, 461) reversed.

(Argued March 24, 1876; decided April 4, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department in favor of plaintiff, entered upon an order denying a motion for a new trial, and

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Statement of case.

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directing a judgment upon a verdict. (Reported below, 6 Hun, 461.)

This action was brought to recover damages for the death of plaintiff's intestate, Christopher B. Cordell, alleged to have been caused by defendant's negligence.

Said Cordell was, on the 13th of August, 1873, struck by a locomotive running upon defendant's road, and killed. The place where the accident happened had been, prior to 1867, a farm-crossing, with gates on each side of the track. It was included in a highway regularly laid out in that year, which highway had been distriated and worked as a highway, and was used by a few families, but the fences and gates had not been removed up to the time of the accident. Defendant had taken down the fence and gate on one side for the purpose of laying a new track. Evidence was given tending to show the service of notice of the opening of the highway upon defendant's superintendent, it having been first shown to the treasurer, and by his directions handed to the superintendent. The notice was not produced. The superintendent and treasurer both testified that they had no recollection or knowledge of such service. No bell was rung or whistle sounded on the engine as it approached the crossing. .

The court charged, among other things, that as matter of law, defendant having failed to ring the bell or sound the whistle, as the statute required, when crossing a public highway, it was guilty of negligence; to which charge defendant's counsel duly excepted. Exceptions were ordered to be heard at first instance at General Term.

Further facts appear in the opinion.

*Samuel Hand* for the appellant. The motion for a non-suit should have been granted, because the negligence of plaintiff's intestate contributed to his death. (*Gorton v. Erie R. Co.*, 45 N. Y., 660; *Barker v. Savage*, id., 191; *Fordham v. Smith*, 46 id., 683; *Lowrie v. Meeker*, 25 id., 361; *Robertson v. McManus*, 4 Lans., 380; *Seibert v. Erie R. Co.*, 49 Barb., 583; *Reynolds' Case*, 58 N. Y., 248;

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*Davis' Case*, 47 id., 400.) The court erred in holding as matter of law that defendant was guilty of negligence, and in charging that the omission to ring the bell or sound the whistle was of itself conclusive evidence of negligence. (3 Stat. at Large, 643, § 7; *Comm. v. B. and W. R. R. Co.*, 101 Mass., 201; chap. 140, Laws 1850, §§ 1, 2, 3, 23.) The duty of the deceased to look and listen was entirely independent of defendant's duty to give the signals. (*McGrath's Case*, 59 N. Y., 468; *Havens' Case*, 41 id., 296; *Gonzales' Case*, 38 id., 440; *Gorton's Case*, 45 id., 660; *Ernst's Case*, 39 id., 9; *Wilcox's Case*, id., 358.)

*J. H. Clute* for the respondent. The failure of defendant to sound the whistle or ring the bell for eighty rods when approaching the crossing was gross negligence. (*Tonawanda R. R. Co. v. Munger*, 5 Den., 267; 4 N. Y., 349; *Gorton v. Erie R. Co.*, 45 id., 660.) The question of contributory negligence on the part of the deceased was properly left to the jury. (*Baxter v. T. and B. R. R. Co.*, 41 N. Y., 502; *Warner v. N. Y. C. and H. R. R. R. Co.*, 44 id., 465; *Davis v. N. Y. C. and H. R. R. R. Co.*, 47 id., 400.) The deceased was bound to exercise ordinary care and precaution. (45 N. Y., 665; 28 id., 451; *Weber v. N. Y. C. and H. R. R. R. Co.*, 58 id., 456; *Davis v. N. Y. C. and H. R. R. R. Co.*, 47 id., 400.)

ANDREWS, J. The judge charged the jury that the railroad company having omitted to ring the bell or sound the whistle before reaching the crossing, where the plaintiff's intestate was killed, was as matter of law guilty of negligence. This charge can only be justified upon the assumption that the crossing was a "traveled public road" within the meaning of the general railroad act, as amended by chapter 282 of the Laws of 1854, the seventh section of which makes it the duty of a railroad company to ring a bell or sound a whistle at least eighty rods before crossing a traveled public road or street, and subjects the corporation to a fine for a neglect to



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comply with this provision of the act, and makes it liable for all damages which shall be sustained by any person by reason of such neglect. If the crossing where the plaintiff's intestate was killed was a highway, in respect to which the absolute duty to ring the bell or sound the whistle existed, the charge is not subject to objection. The judge not did intend to charge that the right to recover in the action was established on proving simply the neglect by the defendant of the statutory duty, but that the omission to give the signals at this crossing, which he also held and charged as matter of law, was a highway at which the company was bound to give them, constituted negligence which subjected the defendant to liability for damages if the death of the plaintiff's intestate was caused thereby. The correctness of the charge, that the omission by a railroad corporation to ring the bell or sound the whistle, when the statute requires it to be done, is legal negligence, is supported by authority. (*Renwick v. N. Y. C. R. R. Co.*, 36 N. Y., 132; *Gorton v. Erie Railway Co.*, 45 id., 660.) But unless the crossing was a highway in respect to which the statutory duty existed, the omission to give the signals was not as matter of law negligence. It was and is the duty of a railroad company to use due care at all times in running and managing its trains, which it owes alike, though it may be in different degree, to passengers and persons rightfully upon its track, and ordinary care and prudence may require the giving of signals from the train to warn persons upon the track in danger of being injured by it, although there is no public highway at the place, and the omission to give the warning, if the jury should find that due care and caution required that it should be given, would subject the corporation to liability for injury caused by the omission. But it would be error in such a case for the judge to charge that in law such omission was negligence. It would be for the jury to determine the question as one of fact under all the circumstances proved.

The judge, as has been stated, charged the jury in substance that the crossing where the deceased was killed was a high-



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way at which they were bound to give the signals, or in other words, that it was a place in respect to which the absolute legal duty imposed by the statute existed. If the judge was in error upon this point the judgment must be reversed, and the consideration of the other questions in the case will become unnecessary. This crossing, prior to 1867, was an ordinary farm crossing, and gates were maintained on each side. In that year it was included in a highway laid out by the commissioners of highways of the town of Watervliet, in conformity with the statute. But so far as appears, nothing was done in respect to opening the highway by removing fences or gates up to the time of this accident, except that the defendant, for the purpose of widening its track, had, a short time before the accident, temporarily removed the fence on one side of the roadway. The fence and gate on the other side were maintained as before the highway was laid out. It was shown that the highway had been districted, and that the defendant paid a road tax before and after the occurrence in question, and laid down plank at the crossing after the highway was laid out, but it appeared that this had also been done before that time. The road was used by a few families residing upon it, but the company had not before the accident treated it as an ordinary highway, and had not rung the bell or sounded the whistle at the crossing. There was no defect in the proceedings in laying out the highway. The damages to land owners were paid or released, and it became a legal highway, subject, however, to the provision of the act chapter 62 of the Laws of 1853, "to regulate the construction of roads and streets across railroad tracks," the first section of which provides that no street or highway laid out by the authorities of any city, village or town over a railroad track, "shall be actually opened for use until thirty days after notice of such laying out has been personally served upon the president, vice-president, treasurer or a director of a corporation."

It was assumed on the trial, and it is doubtless the true construction of this statute, considered in connection with the

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general railroad law and the provision of the general highway act, that until a highway which has been laid out across a railroad track has been actually opened, or notice has been given as required by the act of 1853, the duty to give the statutory signals by the company does not attach. Such a crossing is not a "traveled public road" within the meaning of the general railroad law. Evidence was given on the part of the plaintiff tending to show that the notice had been given, but the notice was not produced, and the evidence upon which the plaintiff relied to establish it was not conclusive in its character. The superintendent and treasurer of the defendant upon whom it was claimed the notice had been served, testified that they had no knowledge or recollection of such service, and the evidence on the part of the plaintiff of the fact was fairly subject to observation and criticism, although we do not mean to say that if the jury had found that notice had been served, the finding would not have been justified. But whether the notice had been served, ought to have been submitted to the jury as a question of fact, upon the whole evidence, and the judge in withholding it from their consideration, and deciding as a question of law that the crossing was a highway, in respect to which the statutory duty to give the designated signals was imposed upon the defendant, committed an error for which the judgment should be reversed.

All concur, except ALLEN, J., not voting.

Judgment reversed.

## Statement of case.

THE PEOPLE ex rel. THE PACIFIC MAIL STEAMSHIP COMPANY, Appellants, v. THE COMMISSIONERS OF TAXES AND ASSESSMENTS FOR THE CITY AND COUNTY OF NEW YORK, Respondents.

64 541  
138 540

As to whether, under the statutes of this State, there is any other method of taxation of a corporation than by assessing its capital stock at its actual value, without regard to the *situs* of the property, *quære*.

Assuming that the personal property of a corporation located outside of the State is in any event entitled to exemption from taxation, a temporary absence is not sufficient to create the exemption; but the change of location must be permanent, positive and unequivocal.

The fact that a steamship company, located for the purposes of taxation within this State, has invested a portion of its assets in steamships owned by and being built for it outside of the State, does not exempt it from taxation upon such vessels.

In an affidavit presented to the commissioners of taxes and assessment for the city and county of New York, for the purpose of claiming exemption from taxation upon vessels so being constructed, the value of the vessels was not shown, but simply the amounts paid upon account thereof to the contractors. *Held*, that the affidavit was fatally defective; that, if entitled to an exemption, the actual value should have been shown affirmatively and clearly.

(Argued March 24, 1876; decided April 4, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department modifying an assessment made by the commissioners of taxes and assessment of the city and county of New York upon relators' capital stock and affirming the same as modified, which assessment was brought up for review by certiorari. (Reported below, 5 Hun, 200.)

The said commissioners originally assessed relator at \$20,000,000. The assessment was objected to, and application made for a correction upon an affidavit of the vice-president of the relator, with schedules attached. The commissioners reduced the assessment to \$5,749,518, which they ascertained by fixing the actual value of the capital of the company at \$14,850,526.49 and deducting therefrom the value of the

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company's real estate, its own stock held by it, certain vessels not registered in the port of New York, and other personal property permanently located elsewhere. The relator objected to the corrected assessment: First. That the commissioners should have also deducted the amount of stock owned by relator of the California Dry Dock Company, a foreign corporation. Second. That they should have deducted the value of the sums paid on account of certain steamships in the process of construction outside of the State.

The statement in the affidavit in reference to the second objection was as follows:

"That another large portion of such personal property consists of steamships in process of construction, all of which, on the said first day of January, 1874, were being constructed outside of the State of New York, under contracts with the builders thereof, by which it is stipulated that the title to said vessels and the ownership of the same shall vest in the said Pacific Mail Steamship Company as fast as the building of said vessels respectively progresses, and that schedule F contains a description of said steamships, and shows the actual sums of money which have been paid by the said company on account of the same respectively, prior to January 1, 1874."

Schedule F simply gave the names of the steamships so being constructed, with the amount of money paid on each.

The General Term allowed the first objection, and directed the value of the capital stock of said corporation to be deducted, and the assessment was so modified.

*Coles Morris* for the appellants. With regard to the exemption from taxation of personal property out of the State, there is no difference between individuals and corporations. (*People ex rel. Bk. of Comm. v. Comrs. of Taxes*, 23 N. Y., 192, 223; *People ex rel. Pac. S. S. Co. v. Comrs. of Taxes*, 1 T. & C., 611.) The relator was not liable to be taxed on the steamships permanently located on the Pacific coast. (*People ex rel. P. M. S. S. Co. v. Comrs. of Taxes*, 58 N. Y., 242; *State Tax on Foreign-held Bonds*, 15 Wal., 300, 319;

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*R. R. Co. v. Jackson*, 7 id., ; *McCulloch v. State of Maryland*, 4 id., 317, 429; *U. S. v. Rice*, 4 Wheat., 246.)

*James C. Carter* for the respondents. The general scheme of taxation in respect of the property of corporations other than real does not look to any valuation of their property as such, or where it might be situated, or take account of their debts in determining the amount on which they should be taxed. (*Bk. of Utica v. City of Utica*, 4 Paige, 399; *People v. Suprs. of Niagara*, 4 Hill, 20; *Oswego Starch Factory v. Dolloway*, 21 N. Y., 449; *People ex rel. Bk. of Comm. v. Comrs. of Taxes*, 40 Barb., 334; 2 Black, 620; *People ex rel. Cit. G. L. Co. v. Bd. of Assrs. of Bklyn.*, 39 N. Y., 81.) The relators failed to make out a case for exemption in respect to the steamers in process of construction outside of the State. (*People ex rel. P. M. S. S. Co. v. Comrs.*, 58 N. Y., 242.)

MILLER, J. It is claimed that the appellants were exempted from taxation upon certain steamships belonging to them, which were in the process of construction outside of the State of New York. The relators were bound to make out a case, and without considering the sufficiency of the other facts stated in the affidavit presented to the commissioners, there is one fatal defect which cannot be obviated, and that is that they did not show the value of the steamers which it was alleged were in the course of being built by or on the behalf of the company beyond the jurisdiction of the State. Proof that money had been paid on account of the same to the contractors, which was all that the affidavit showed, was not evidence of their real and actual value or sufficient to establish that fact. This should have been proved affirmatively and clearly, and it should have been shown by other and satisfactory evidence that this money had been actually used and expended in the building of the steamships. For any thing which is made to appear from the affidavit or otherwise, the money may have been paid in advance,

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and at the time may not have been applied for the purposes claimed. There was most manifestly a deficiency in the proof which, of itself, would have justified the conclusion at which the commissioners arrived, that no exemption was made out.

But aside from the reason stated there is, we think, another insuperable difficulty in the way of sustaining the exemption claimed, and that is that the *situs* of the vessels alleged to have been building outside of the State was by no means fixed so as to authorize the conclusion that they were beyond the jurisdiction of the State of New York, so as to be exempted from the reach of taxation there. A temporary absence from this State would not, of itself, be sufficient for such a purpose; for, if this was so, then a casual change of the locality of personal property would relieve it from the operation of the assessment laws. Assuming that the personal property of an incorporation which is located abroad or outside of the State, is at all entitled to exemption, the change should be permanent, positive and unequivocal. If such an exemption can be upheld at all, it cannot be sustained where the change is only for a season, uncertain and vacillating, and merely consists in the building of vessels which are owned by an incorporation which has a location for the purposes of taxation within the State.

We deem it proper to say we do not intend to intimate, that under the statutes of this State, there is any other mode of taxation of a corporation than by assessing the capital stock at its actual value, without regard to the *situs* of its property.

It follows from the views expressed that the judgment of the General Term was right and must be affirmed, with costs.

All concur.

Judgment affirmed.

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Statement of case.

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FREDERICK B. SWIFT, Respondent, v. JOHN S. PROUTY,  
Appellant.

A right to set off a judgment in favor of A. against B., against a judgment in favor of B. against A., cannot be asserted by motion on behalf of A., where it appears that before B.'s judgment was obtained he assigned his claim to a third person. If A. has any equities they can only be enforced by action, not by motion.

As to whether an order denying a motion to set off one judgment against another is reviewable here, *quære*.

(Argued March 28, 1876; decided April 4, 1876.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department reversing an order granting a motion on the part of defendant to set off a judgment in his favor against the plaintiff herein, obtained prior to the rendering of judgment herein against the judgment obtained herein by the latter against the former. (Reported below, 6 Hun, 94.)

It appeared by the opposing papers that, prior to the rendering of judgment herein, plaintiff assigned his claim to one Burt, his attorney in the action, and after the judgment was perfected assigned the judgment to said Burt.

*Davis & Lyon* for the appellant. This court has power to set off a judgment of another court against one obtained in this court. (*Stacy v. Patten*, 3 Wend., 331; *Harris v. Palmer*, 5 Barb., 105; *Ross v. Hicks*, 11 id., 481; *Cooke v. Smith*, 7 Hill, 186; *People v. N. Y. C. P.*, 13 Wend., 652.) The fact that the judgment had been assigned to a third person did not defeat defendant's right to set off the judgment held against plaintiff. (*People ex rel. Manning v. N. Y. C. P.*, 13 Wend., 650; *Nicoll v. Nicoll*, 16 id., 446; 17 Abb., 146; 9 id., 14, 370; 2 Rob., 670; 2 Duer, 684; 5 How., 339.)

*J. E. Cary* for the respondent. Defendant's judgment could not be set off against plaintiff, because the latter had assigned his judgment. (*Prouty v. Rice*, 51 N. Y., 594; *Firmenich v. Bovee*, 1 Hun, 532; 2 R. S., §§ 354, 12; 4 Hill,

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559; Mont. on Set-off, 23.) Plaintiff's attorney had a lien on his judgment for his costs and disbursements, which would be protected against any right of set-off. (1 Paige, 622; 4 id., 677; 11 Abb., 66-69; 9 id., 366; 9 How., 16; 18 N. Y., 368; 1 Hun, 532; *Perry v. Chester*, 53 N. Y., 240; *Marshall v. Meech*, 51 id., 143; *Rooney v. Second Ave. R. R. Co.*, 18 id., 368; 4 Hill, 557; *Ward v. Syme*, 6 How. Pr., 16; *Hovey v. Rub. Tip Pencil Co.*, 14 Abb., 66; *Ward v. Woodworth*, 1 E. D. S., 598; *McGregor v. Comstock*, 28 N. Y., 240; Wait's Pr., 245, 246; 3 id., 542, 543; *Resquin v. Knick. Stage Co.*, 12 Abb., 324; *Fitch v. Gardner*, 2 Keyes, 516; *Adams v. Ft. Plain Bk.*, 23 How. Pr., 45; *Smith v. Lowden*, 1 Sandf., 696; *Gihon v. Fryatt*, 2 id., 637.)

ALLEN, J. At the time of the assignment of the claim of Swift to Burt it was not in judgment, and therefore not the subject of a set-off against the judgment of Prouty against the assignor upon summary application to the court. The assignee of the Swift claim took it subject only to such equities in favor of Prouty as existed at the time of the assignment; and as there was then no right of set-off, upon motion the application was properly denied. When the judgment was perfected the claim was then, for the first time, the subject of a set-off, and could then only be set off by motion as the property of Smith. But he had parted with his right, and if Prouty had any equities, they could only be enforced by action, and could not be *asserted* by motion. This was decided in *Graves v. Woodbury* (4 Hill, 559), and reaffirmed in *Spencer v. Barber* (5 id., 568); *Peckham v. Barcalow* (H. & Den., 112), and *Gay v. Gay* (10 Paige, 369). It may be questionable whether on applications of this character, addressed to the discretion of the court, the order is appealable, but without considering that question, it may be affirmed upon the authorities cited.

The order must be affirmed.

All concur.

Order affirmed.



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Statement of case.

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64 547  
156 579

IN THE MATTER OF THE APPLICATION OF THE CITY OF BUFFALO  
FOR THE APPOINTMENT OF COMMISSIONERS TO APPRAISE CERTAIN  
LANDS PROPOSED TO BE TAKEN FOR EXTENDING THE  
MAIN AND HAMBURGH STREET CANAL.

Under the provision of the charter of the city of Buffalo (chap. 519, Laws of 1870), authorizing the city to take the fee of lands for corporate purposes, proceedings were instituted to take lands of a railroad company, in accordance with a resolution of the common council. Upon appeal from an order appointing commissioners, the General Term held that the court at Special Term "had no authority to inquire into any thing except the mere regularity of the proceedings and as to who should be commissioners." *Held*, error; that a legal question was presented, *i. e.*, as to whether, under the grant of power contained in the charter, the city was authorized to appropriate the fee of lands held by a railroad company, for public use, and acquired by the exercise of the right of eminent domain, which question the court hearing the application necessarily had the power to decide.

As to whether the charter confers the power to make such an appropriation, *quære*.

(Argued March 28, 1876; decided April 4, 1876.)

THESE were appeals by the Lake Shore and Michigan Southern Railroad Company, the New York Central and Hudson River Railroad Company, the Buffalo, New York and Erie Railroad Company, and the Erie Railway Company, from an order of the General Term of the Superior Court of the city of Buffalo affirming an order of Special Term appointing commissioners to appraise lands of the appellants proposed to be taken in pursuance of a resolution of the common council, for the purpose of extending thereon the Main and Hamburg street canal. The facts as regards the lands of the Lake Shore and Michigan Southern Railroad Company are sufficiently stated in the opinion, and they were similar in the other cases.

*A. P. Laning* and *E. C. Sprague* for the appellants. The General Term erred in refusing to consider the question whether the common council of Buffalo had the power to

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condemn the lands in question. (Laws 1870, chap. 519, title 8; *Han. F. Ins. Co. v. Tomlinson*, 58 N. Y., 215; *N. Y. C. and H. R. R. Co. v. Cunningham*, 13 Alb. L. J., 145; *In re R. and S. R. R. Co. v. Davis*, 43 N. Y., 137, 147.)

*Frank R. Perkins* for the respondent. The court had only authority to inquire whether all the steps required by the statute had been taken, and as to who should be commissioners. (*Embury v. Connor*, 3 N. Y., 511.) A mere question of regularity is not appealable to this court. (*King v. Mayor*, 36 N. Y., 182; *N. Y. C. R. R. Co. v. Marvin*, 11 id., 276; *In re Broadway*, 49 id., 150.)

ANDREWS, J. Section 1, title 8 of the charter of the city of Buffalo (Laws of 1870, chapter 519) declares that the city "shall have power to take lands for public buildings, for parks, public grounds, squares, streets, alleys, fountains, canals, basins, slips and other public waters, and for any other corporate purpose or object." The subsequent sections of the title prescribe the proceedings to be taken to acquire the title to lands which the common council shall determine to take, for any of the purposes mentioned in the first section, and for the appointment of commissioners to ascertain the compensation to be made to the owners of the lands taken. The commissioners are to be appointed by a court of record upon the application of the city attorney, upon notice to the parties interested, and the city is required, within one year after the confirmation of the report of the commissioners, to pay, to the persons to whom compensation shall have been awarded, the compensation awarded to them respectively. The eighteenth section declares that "upon making to the respective persons the compensation awarded to them, or pay the same into court, the fee of the lands shall vest in the city."

Under this statute the city of Buffalo instituted proceedings to take lands for the extension of the Main and Hamburg Street canal, from its present terminus at Hamburg

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street to the Buffalo river, and the land proposed to be taken was a strip about two miles long and sixty feet wide. A part of the land sought to be taken was occupied by the Lake Shore and Michigan Southern Railway Company, a corporation which has succeeded to the rights of the Buffalo and State Line Railroad Company, and which latter company had acquired it by condemnation under the provisions of the general railroad act. The company has constructed upon the land, and were using several tracks, turnouts and switches, over which numerous trains passed daily. Upon the application for the appointment of commissioners these facts appeared, and affidavits were presented to the court on the part of the company, tending to show that it would sustain great injury if the land should be taken for the proposed canal, and these were met by counter affidavits on the part of the city, showing among other things that the tracks could be carried over the canal on bridges, without producing serious inconvenience to the company. Upon this state of facts, an important legal question was presented to the court, which is not free from serious difficulty, viz., whether, under the general grant of power contained in the charter, the city was authorized to appropriate for the purpose of the canal, the fee of lands held by the company under the statutes of the State, also for a public use, and acquired through the exercise of the right of eminent domain.

The question is one of statutory construction; whether the power given by the charter is to be construed as authorizing this proceeding in respect to lands so situated. The charter contemplates not the appropriation of the use simply of the lands taken under it, but the taking of the fee, divesting all existing titles and interests, and vesting in the city upon compensation made, an absolute and unqualified title. This question the court hearing the application necessarily had the power to decide. If the case presented was not within the law, commissioners could not legally be appointed. Assuming that the court could not review the judgment of the common council as to the necessity for taking the lands,

## Statement of case.

or their discretion in determining upon the plan or extent of the improvement, it had power to inquire and decide whether it could act at all upon the application. The learned judge at Special Term did consider the question, and in an elaborate opinion held that the charter conferred the power claimed by the city to take the lands of the company for the improvement, and made an order appointing commissioners. The company appealed from the order to the General Term, and that court affirmed it without considering the question decided at the Special Term, on the ground that the judge at Special Term "had no authority to inquire into any thing except the mere regularity of the proceedings, and as to who should be commissioners."

In this the court were in error. The General Term has not considered the question now presented, but declined to pass upon it, upon an erroneous construction of the power of the Special Term, and of its own power as a court of review. The case should be remitted to the General Term, to the end that this question may be there considered and decided. We express no opinion upon it. We cannot properly do so in the present position of the case.

The same disposition is made of the appeals by the other appellants, The New York Central and Hudson River Railroad Company, Erie Railway Company, and Boston, New York and Erie Railroad Company.

All concur.

Order reversed, and case remitted.

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SETH W. HALE, Appellant, v. THE OMAHA NATIONAL BANK.  
Respondent.

As to whether an action can be maintained by one claiming a prior equitable lien upon personal property against a subsequent mortgagee upon the ground that defendant has so conducted himself in the exercise of his legal right of sale as unnecessarily to reduce the value of plaintiff's lien, *quære*.

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Statement of case.

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Such an action cannot be maintained where it appears that defendant did nothing but exercise his legal right to foreclose his mortgage and sell the interest of the mortgagor in the property.

Plaintiff's complaint alleged, in substance, that he had an equitable lien upon certain personal property, which property defendant wrongfully sold and converted to its own use, thereby depriving plaintiff of his lien. It appeared that the property was taken and sold by defendant under and by virtue of certain chattel mortgages thereon. It did not appear that the property was sold in parcels or was scattered or dissipated, or that it was sold to a *bona fide* purchaser without notice of plaintiff's lien, or that the property was sold in hostility to plaintiff's rights. It did appear that the property was sold for its full value, but that only the rights and interests of the mortgagors and of defendant were sold. *Held*, that the fact that the property was sold for full value was insufficient to establish that the sale was hostile to plaintiff, and was not inconsistent with his right to enforce his lien; and that a cause of action for an injury to plaintiff's lien was not established.

(Argued March 29, 1876; decided April 4, 1876.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York affirming a judgment in favor of defendant, entered upon a decision of the court at Special Term. (Reported below, 7 J. & S., 207.)

The complaint in this action contained two counts. The first alleged, in substance, that the firm of Cozzens & Co., of Omaha, Nebraska, leased of "The Credit Foncier of America" certain hotel property in said city of Omaha for the term of five years by lease dated June 22, 1867, which lease, after specifying the amount of rent and the terms of payment, contained this clause: "And a lien to be given by said lessees to said lessors to secure the payment thereof, as hereinbefore stipulated, on all the furniture, which shall be placed in said hotel by said lessees;" that the lessees took possession and furnished the hotel, and kept it until November 1, 1868, when they abandoned it; that the lessors assigned the lease and all its interest in and to the rents due and to become due to plaintiff; that on the 1st May, 1868, defendant took possession of the furniture, sold the same, and wrongfully converted the same and the money realized from the sale, which it refused to pay over on demand; that, by

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Statement of case.

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such wrongful conversion, plaintiff was unable to make or enforce his lien. The second count alleged that defendant wrongfully took possession of said furniture, upon which it well knew plaintiff had a good and valid prior lien, without plaintiff's consent, and in violation of his rights, and sold the same and converted the avails, whereby plaintiff was unable to collect his claim against Cozzens & Co., they being utterly insolvent.

The court found the making of the lease and the assignment to plaintiff, the furnishing of the hotel by the lessees, and that on the 14th October, 1867, they executed to plaintiff a chattel mortgage on the furniture to secure notes to the amount of \$6,000, and also executed a chattel mortgage to defendant on the 10th March, 1868, to secure \$5,900; that, on the 24th September, 1868, plaintiff transferred and assigned his notes and mortgage to defendant; that, on the 28th April, 1868, defendant's mortgage being due, it demanded possession of the property, and Cozzens & Co., having refused to deliver possession, commenced an action for a recovery of possession of the same, in which action an order was duly issued to the sheriff, who by virtue thereof took and delivered the property to defendant, which it retained until November 10, 1868, when it sold the same under and by virtue of said mortgages, the property realizing its full value; that there was no evidence how the property was sold, whether in one lot or in parcels, or whether the purchasers had or had not notice of plaintiff's claim; that defendant sold only the rights and interests of Cozzens & Co. and of itself, and did not sell the interest of plaintiff, if any therein, and that defendant applied the proceeds of the sale toward the payment of its mortgages, and, as conclusion of law, that defendant lawfully took possession, sold and applied the proceeds as aforesaid, and directed a dismissal of the complaint. Judgment was entered accordingly.

*Edward T. Bartlett* for the appellant. This was not an action of trover. (*Hale v. Omaha Nat. Bk.*, 49 N. Y., 631.)

## Statement of case.

Plaintiff had an equitable lien on the furniture placed in the hotel, as against Cozzens & Co., and all persons asserting a claim thereto under them, either with notice of the lien, or not being *bona fide* mortgagees or purchasers in good faith. (1 Story's Eq. Jur., § 649; 4 Bouv. Inst., *n*, 3729; 1 Fonbl. Eq., *b*, 1, chap. 6, § 9, note; *Hathaway v. Payne*, 34 N. Y., 103; *Champion v. Brown*, 6 J. Ch., 388; *Griffith v. Beecher*, 10 Barb., 432; *Moore v. Barrows*, 34 id., 173; *Smith v. Gage*, 41 id., 60; *Merithew v. Andrews*, 44 id., 200; 3 R. S. [5th ed.], 199, § 78; *Craig v. Leslie*, 3 Wheat., 578; *Wright v. Wright*, 1 Ves., 409-411; *Beekley v. Newland*, 2 P. Wms., 182; *Hobson v. Trevor*, id., 191; *Laughton v. Horton*, 1 Hare, 549; *Case of Ship Warre*, 8 Price, 269, *n*; *Curtis v. Auber*, 1 J. & W., 506; *Mitchell v. Winslow*, 2 Story, 639; 2 Story Eq., § 1231; Cross on Liens, chap. 12, pp. 187, 188, 191, 192; *Prebble v. Boghurst*, 1 Swanst., 309; *Needham v. Smith*, 4 Rus., 318; *Randall v. Willes*, 5 Ves., 262, 274, 275; *Simond v. Hibbert*, 1 R. & M., 719; *Seymour v. C. and N. F. R. R. Co.*, 25 Barb., 284; *Wood v. Leslie*, 29 id., 145; *Field v. Mayor, etc.*, 2 Seld., 179; *Stover v. Eyclesheimer*, 3 Keyes, 620; *Wood v. Lester*, 29 Barb., 145; *Un. Mfg. Co. v. Lonsbury*, 41 N. Y., 374; *Hall v. City of Buffalo*, 1 Keyes, 199; Story's Eq., §§ 1040, 1040 *b*, 1055; *In re Howe*, 1 Paige, 129; *White v. Carpenter*, 2 id., 266; *Finch v. Earl of Winchelsea*, 1 P. Wms., 282; *Burn v. Burn*, 3 Ves., Jr., 576; *Delaire v. Keenan*, 3 Dess. [S. C.], 74; *Foster v. Foust*, 2 S. & R. [Penn.], 11; 2 L. Cas. in Eq. [W. & T., 4th Eng. ed., 1872], 772; *Wellesbey v. Wellesbey*, 4 M. & C., 561; *Metcalf v. Archbishop of York*, 1 id., 547; *Lyde v. Myner*, 4 Sim., 504; *Tooke v. Hastings*, 2 Vern., 9; *Winslow v. Mer. Ins. Co.*, 4 Metc., 306.) Defendant was not a *bona fide* mortgagee under either of the chattel mortgages on the furniture in the hotel. (*Weaver v. Barden*, 49 N. Y., 293; *Dicker v. Tillinghast*, 4 Paige, 215; *Coddington v. Bay*, 20 J. R., 637; *Van Heusen v. Radcliff*, 17 N. Y., 583; *Stalker v. McDonald*, 6 Hill, 93; *Youngs v. Lee*, 12 N. Y., 551; *Farrington v. Frank. Bk.*, 24 Barb., 554; *Boyd v. Cum-*



## Statement of case.

*mings*, 17 N. Y., 101; *Essex Co. Bk. v. Russell*, 20 id., 673; *Brown v. Leavitt*, 31 id., 113; *Cary v. White*, 52 id., 138; *Bk. of N. Y. v. Vandervoort*, 32 id., 553; *Lawrence*, 36 id., 128; *Rosa v. Botherson*, 10 Wend., 85; *Payn v. Cutler*, 13 id., 605; *Chrysler v. Renois*, 43 N. Y., 209; *U. S. v. Hodge*, 6 How. [U. S.], 279; *Bangs v. Strong*, 10 Paige, 11, 16; *Niemcewicz v. Gahn*, 3 Paige, 614; affirmed, 11 Wend., 312; 1 Parsons on Notes and Bills, 224; *Wood v. Robinson*, 22 N. Y., 564; *Bell v. Banks*, 3 M. & G., 258; *Elwood v. Diefendorf*, 5 Barb., 398; *Platt v. Coman*, 37 N. Y., 440; *M. and F. Bk. of Albany v. Nixon*, 42 id., 438; *Jennison v. Stafford*, 1 Cush., 168; *Howell v. Jones*, 1 C., M. & R., 97; *Fellows v. Prentiss*, 3 Den., 512; *Ayrault v. McQueen*, 32 Barb., 305; *Cardwell v. Hicks*, 37 id., 458; *Traders' Bk. of Rochester v. Bradner*, 43 id., 379; *Mickles v. Colvin*, 4 id., 304; *Park Bk. v. Watson*, 42 N. Y., 490; *Brown v. Leavitt*, 31 id., 113; *Chrysler v. Renois*, 43 id., 209; *Boyd v. Cummings*, 17 id., 101.) Cozzens & Company were trustees for plaintiff of the furniture placed in the hotel, and all those taking it took it subject to the equitable lien of plaintiff, and will be construed in equity to be trustees, and liable as such to the same extent as the trustees from whom they took it. (Perry on Trusts [2d ed.], §§ 67, 82, 122, 217, 232, 241, 828, 843; *Mackreth v. Symmons*, 15 Ves., 329; 1 L. Cas. in Eq., 336; *Lemon v. Whitey*, 4 Rus., 423; *Chapman v. Tanner*, 1 Vern., 267; *Blackburn v. Greyson*, 1 Bro. Ch., 428; *Burgess v. Wheat*, 1 Edm., 211; Story's Eq., § 1217; Sugd. on Vendors [8th Am. ed.], note *k*, m. p. 680; *Currie v. White*, 45 N. Y., 822; *Pye v. George*, 1 P. Wms., 128; *Mansell v. Mansell*, 2 id., 678; *Kennedy v. Daly*, 1 S. & L., 355; *Crofton v. Ormsby*, 2 id., 583; *Murray v. Ballou*, 1 J. Ch., 566; *Van Allen v. Am. Nat. Bk.*, 52 N. Y., 1; *Haggerty v. Palmer*, 6 J. Ch., 437; *Denton v. Davies*, 18 Ves., 504; *Oliver v. Platt*, 3 How. [U. S.], 333; *Freeman v. Cook*, 6 Ire. [N. C.], 379; *Roberts v. Mansfield*, 38 Ga., 458; *Norman v. Cunningham*, 5 Grat. [Va.], 72; *Flagg v. Mann*, 3 Sumn., 84; *Hawkins v. Hawkins*, 1 D. & S., 75; Hill on



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Trustees, 522; *Kitchen v. Bedford*, 11 Wal., 413.) The holder of an equitable lien has his remedy against all parties who interfere with or defeat the same, having notice thereof or standing in the position of mere volunteers under the party creating the lien. (*Gonlet v. Asseler*, 22 N. Y., 225; *Hall v. Carnley*, 17 id., 202, 204; *Manning v. Monahan*, 28 id., 585; *Hathway v. Brayman*, 42 id., 322.)

*Wheeler H. Peckham* for the respondent. The sale by defendant did not interfere with plaintiff's rights. (*Hull v. Carnly*, 17 N. Y., 202; *Goulet v. Asseler*, 22 id., 225; *Manning v. Monahan*, 28 id., 585; *Hathaway v. Brayman*, 42 id., 322; *Trust v. Pierson*, 1 Hilt., 292.) Defendant was a *bona fide* holder for value, and held in priority to the plaintiff's claim under the lease. (*Bk. of Sandusky v. Scoville*, 24 Wend., 114; *Traders' Bk. of R. v. Bradner*, 43 Barb., 379; 42 N. Y., 438; *Taylor v. Baldwin*, 10 Barb., 627; *Currie v. Mesa*, 10 L. R. Exch., 153-162.) The assignment by plaintiff to defendant of plaintiff's mortgage gave defendant a prior right under the lease. (1 Story Eq., § 642.) The doctrine of trusts has no application. (58 N. Y., 463.)

CHURCH, Ch. J. This case has been before this court upon a demurrer to the complaint. A majority of the court overruled the demurrer, holding that the count which set up an equitable lien upon the property belonging to the plaintiff, and charged that defendant had wrongfully sold and converted the property to its own use, and deprived the plaintiff of his lien, was good. (49 N. Y., 626.) There was no allegation of right or title in the defendant. The case now comes up upon appeal from the judgment after trial upon exceptions to the findings of the judge before whom it was tried. It now appears, and is found, that the defendant sold the property by virtue of two chattel mortgages, one executed by Cozzens & Company to the plaintiff, and assigned to the defendant, and the other by Cozzens & Company to the defendant. It is not claimed that the plaintiff can maintain this action as an action of trover or trespass, but it is

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affirmed that it is maintainable upon the ground that the defendant has so conducted himself, in the exercise of a legal right, as unnecessarily to reduce the value of the plaintiff's lien, and injure or destroy his reversionary interest. It has been intimated by able judges that such an action might be maintained against subsequent mortgagees and creditors by a prior incumbrancer, but we have been referred to no case where precisely such an action has been sustained. (22 N. Y., 225 ; 28 id., 585 ; 42 id., 322 ; 1 Kern., 501 ; 17 N. Y., 202.) Conceding that the defendant's mortgages are to be regarded as subordinate to the equitable lien claimed by the plaintiff, nearly all the elements necessary to sustain an action for injury to the reversionary interest, as it is called, are wanting in this case. It does not appear that the property was sold in parcels, or was scattered or dissipated. The judge finds that there was no evidence on the subject, of how it was sold, in this respect. It is not found that it was sold to *bona fide* purchasers without notice of the plaintiff's lien. It is not found that the property was sold in hostility to the plaintiff's rights. On the contrary, it is expressly found that only the rights and interest of the mortgagors and of the defendant were sold. For aught that appears, the property remained together after the sale as accessible to any claim which the plaintiff could enforce as it was before the seizure and sale by the defendant. The only fact found tending to establish a hostile proceeding is, that the property sold at its full value, but this fact is not sufficient, nor is it inconsistent with the right of the plaintiff to enforce his lien, although it may indicate that the purchaser intended to contest it. Assuming the most favorable state of facts for the plaintiff, and regarding the defendant as a subsequent incumbrancer, the defendant did nothing but exercise its legal right to foreclose its mortgages, and sell the interest of the mortgagors in the property, and there is no principle of law or equity which renders it liable for such an act. (Cases before cited.) In doing this it did not act as trustee for the plaintiff, but acted for itself.

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These views render it unnecessary to examine the question whether the defendant is to be regarded as a *bona fide* mortgagor or not. Nor is it necessary to determine whether such an action can be maintained, nor, if it may, what facts will suffice for that purpose. Those questions will arise when a case is presented, showing that the prior lien has been impaired or destroyed.

The judgment must be affirmed

All concur.

Judgment affirmed.

THE PEOPLE ex rel. PHILO T. RUGGLES, Receiver, etc.,  
Respondent, v. ORLOW W. CHAPMAN, Superintendent,  
etc., Appellant.

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By the act of 1875 (chap. 337, Laws of 1875), providing for the distribution of the property and effects of the Eclectic Life Insurance Company, no authority is given to the court to direct the superintendent of the insurance department to transfer to the receiver of said company for the purposes of distribution, the securities, etc., belonging to said company, deposited with him for the protection of policyholders; it was the intent of the act, upon an order being obtained in the manner prescribed therein, to require such distribution to be made by the superintendent himself.

Accordingly, *held*, that an order directing the issuing a writ of mandamus requiring said superintendent to assign and deliver to the receiver the securities, money and property of said company in his hands, was improperly granted.

(Argued March 28, 1876; decided April 4, 1876.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department affirming an order of Special Term directing the issuing of a peremptory writ of mandamus commanding defendant as superintendent of the insurance department of the State of New York to assign, transfer and deliver over to relator, as receiver of the Eclectic Insurance Company, the securities, moneys and property belonging to said company deposited in the insurance depart-

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ment by said company, "to the end that they may be enforced or the proceeds thereof otherwise obtained for distribution among the parties entitled thereto."

It appeared, and was recited in the order, that an action was commenced against said corporation in the Court of Common Pleas in and for the city and county of New York for its dissolution in pursuance of the provisions of the Revised Statutes, in which action judgment was entered dissolving the corporation and appointing a referee to determine the amount and priority of claims against the company; that the attorney-general made application at the foot of said judgment for an order directing the distribution of the property deposited in the insurance department, pursuant to chapter 337, Laws of 1875; that the application was referred, and the referee made his report, among other things, recommending the transfer of said assets and property to the receiver, with proper provision for the protection of the fund and its application for the benefit of policyholders, which report was confirmed and an order entered directing such transfer; but that the superintendent, upon service of copy of the order, and upon demand being made, declined to make the transfer.

*Henry Smith* for the appellant. The appellant could not transfer the securities in his hands to the receiver, unless authorized by the legislature to do so. (*Ruggles v. Chapman*, 59 N. Y., 165.)

*Jno. L. Hill* for the respondent. The order directing a transfer of the securities to the receiver was proper. (*People ex rel. v. Green*, 58 N. Y., 295\*; chap. 337, Laws 1875; chap. 463, Laws 1853, § 6; 4 N. Y. Stat. at Large, 218; *Cochran v. Van Surlay*, 20 Wend., 365; *Towle v. Forney*, 14 N. Y., 423; *Leggatt v. Hunter*, 9 id., 445; *Suydam v. Williamson*, 24 How., 427.)

MILLER, J. This is an appeal from an order of the General Term, affirming an order of the Special Term, that a

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peremptory mandamus issue commanding the appellant to deliver to the relator, as receiver of the Eclectic Life Insurance Company, certain securities deposited with the insurance department by the said company, in order that the said securities may be enforced, or the proceeds thereof obtained for distribution among parties entitled to the same, as their rights appear in an action in the Court of Common Pleas of the city and county of New York, in which judgment was granted that said company be dissolved, as an insolvent corporation.

In an action brought by the relator against the appellant (59 N. Y., 163), in reference to the same subject-matter, it was held that the receiver had no authority to require from the superintendent of the insurance department the securities deposited with him by the said company, as security for the policyholders, in pursuance of chapter 463, Laws of 1853, as amended by chapter 300, Laws of 1862 ; and that the courts have no power to compel the superintendent to transfer the trust imposed upon him by said act. If any right to the securities referred to exists, it is founded upon the provisions of chapter 337 of the Laws of 1875, which was passed, as its title indicates, to facilitate the distribution of the property and effects of the company named. The first section of the act, after reciting the dissolution of the company and the appointment of a receiver, provides that the attorney-general may apply to the court for an order directing the distribution of the securities, money, etc., belonging to or deposited by the company with the insurance department, and authorizes the court, upon the report of a referee to be appointed for that purpose, to direct that the securities be distributed among the policyholders, as their rights may be determined, and the residue, if any, to be distributed to and among the other persons having legal rights therein, as the same may be established. The second section declares that, upon such order being entered, certified and served on the superintendent, he is authorized and directed to assign, transfer and deliver the said securities, money and property, or otherwise

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dispose of the same as he may be directed by said order. The act is carefully guarded, and evidently was designed to protect the rights of policyholders in the disposition of the securities and the distribution of the avails which might be realized.

The first section of the act provides for a distribution among the policyholders first, evidently having in view the protection of the interests of these parties. This distribution cannot take place until the securities are collected and the money received, so as to make a proper division of the proceeds, ratably, according to the several interests of the policyholders and others. An absolute transfer of the securities to the receiver would prevent the distribution among the persons mentioned until they had been collected by him, and hence this officer would make the distribution, and not the superintendent, as appears to have been contemplated by the act. Although the second section of the act authorizes an assignment, transfer and delivery of such securities, money and property, I think that it was not intended to direct the superintendent to deliver the securities themselves to the receiver, and thus place the distribution in his hands, but to dispose of them, by assignment or otherwise, for the purpose of realizing the amounts thereof and to distribute the money, ratably, according to law, among those entitled thereto.

The transfer of the securities from the superintendent to the receiver, that he may collect and deposit the proceeds with the Union Trust Company, as the order directs, is not contemplated by the act in question or authorized by its requirements. Besides it would appear to be a needless and unnecessary proceeding, as the superintendent has full authority to collect as well as to distribute the avails of the securities, and it is clearly more in accordance with the purpose for which these securities were deposited, that they should be collected and disposed of by the superintendent of the insurance department, upon whom is enjoined the especial duty of guarding and protecting the rights of policyholders as well as creditors. No injury can accrue by such a proceeding;

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while it is not difficult to see that the transfer of the securities from the custody of the officer, who must be well acquainted with their real value, may increase the expense of collection and distribution, and be detrimental to those who are interested in the fund which might be realized from the same.

The retention of the securities and property, and the collection and distribution of the avails when realized is more consistent with the provisions of the act of 1853, by which the good faith of the State is pledged that this officer should hold the fund for the benefit of the policyholders without its being subject to the hazard and expense of a transfer to a receiver. Such a contingency is provided for by the first section of the act which limits the distribution among the policyholders, as their rights are determined by the court. As yet there has been no such adjudication and no order directing any such distribution.

The views expressed dispose of the case, and it is not necessary to consider the other questions presented, and as the act in question does not direct an assignment of the securities to the receiver, and as its provisions can be carried into effect after the proper order is made allowing the superintendent to distribute the proceeds, the order of the Special Term granting a mandamus and that of the General Term affirming the same, was wrong and should be reversed, and motion denied with costs.

All concur.

Order reversed and motion denied.

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THE EVANGELICAL LUTHERAN ST. JOHN'S ORPHAN HOME OF  
THE CITY OF BUFFALO, Respondent, v. THE BUFFALO  
HYDRAULIC ASSOCIATION et al., Appellants.

Where A. grants to B. the right to enter upon his lands to construct a dam thereon near a point specified, and to take possession of such portion of the lands as may be necessary for that purpose, when the dam is located and built, the grant becomes as specific in respect to the land subject to the easement as if it had been particularly described in the

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grant; and neither grantor nor grantee can, without the consent of the other parties in interest, change the location of the dam.

The estate and interest of a corporation in real property, although it may be but an easement, is subject to levy and sale on execution, as property distinguished from the franchise of the corporation.

(Argued March 20, 1876; decided April 11, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department affirming a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 6 T. & C., 589; 4 Hun, 419.)

This action was brought to require defendants to remove a dam across Buffalo creek, which they were constructing upon plaintiff's premises, and to restrain them from constructing any dam on said premises. The referee found, among other things, the following: That prior to and on February 21, 1828, Robert Troup and others were the owners of the lands and premises where the subject of this controversy is located, and are the common source of title of all parties to this action. On that day, by an instrument in writing they granted unto defendant, the Buffalo Hydraulic Association and its successors, "the right and privilege to enter upon and take possession of such piece of land in the bed and on each side of the Buffalo creek, near to and below the confluence of the Cayuga and middle branch of the Buffalo creek, as may be necessarily occupied and covered by a dam or dyke to be there erected and made for the purpose of diverting and conducting the waters of the said creek to the village of Buffalo, and there to erect and maintain such dam or dyke, and thence by means of a canal to be excavated and made through the said lands within the said reservation (and which the said parties of the second part are hereby authorized to excavate and make of any width, not exceeding fifty feet), to divert and conduct the said waters to the said village of Buffalo, and also the right and privilege of using and employing the waters so to be conducted for the purposes and objects expressed in the said act of incorporation."

Under and in pursuance of the easements and rights con-



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ferred by said instrument, said defendant did, about the year 1829, locate and erect a dam, and did excavate a canal therefrom to the then village of Buffalo, and for a time maintained the same.

That under and by virtue of an execution issued upon a judgment obtained against said defendant, the sheriff levied upon and sold, among other things, all the estate and interest of said defendant in said lands, and the same not having been redeemed, were conveyed by the sheriff to the purchaser; that, since said sale and conveyance, various individuals claiming to be the Buffalo Hydraulic Association kept a dam at the place designated until about the year 1871, from which time, until the defendants herein commenced the construction of the dam in question, only portions of a dam have been visible, and no substantial dam has been maintained; that plaintiff, by means of divers mesne conveyances, became seized in fee simple of the lands mentioned and described in the complaint; that, in the summer of 1873, the defendants in this action, without the consent of plaintiff and against its request and direction, entered upon its said lands and premises, and commenced and have nearly completed the construction of a dam across Buffalo creek, which is located at the northerly end about 100 feet westerly from the place where the dam was originally located and maintained, and extending across said Buffalo creek on a course that locates the southerly end thereof between 400 and 500 feet westerly from such place, which is the dam complained of.

*E. Thayer* for the appellants. The easement or privilege to flow water and construct a dam conveyed to the corporation defendant could not be sold under an execution. (Abb. Dig. of Corporations, 348; *Arthur, Prest., etc., v. C. and R. R. Bk.*, 9 S. & M., 394; *Sus. Canal Co. v. Bonham*, 9 W. & S., 27; *Stewart v. Jones*, 40 Mo., 140; *Thompson v. N. Y. and H. R. R. Co.*, 3 Sandf. Ch., 625; *Adams v. Beach*, 6 Hill, 273.) The subject of the grant made to the corporation defendant was an easement or right of way in

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gross. (5 Bouv. L. Dict.; Taylor's L. and T., 213.) The conditions in the grant from Troup were conditions subsequent, and if an estate was created in the corporation a mere failure to perform them did not divest the title. (*Nicholl v. N. Y. and E. R. R. Co.*, 12 N. Y., 121; 2 Roberts, 489.)

*Geo. W. Cothran* for the respondent. The sale by the sheriff divested the corporation of all rights of property it had in the subject in controversy. (Crocker on Sheriffs, § 483; *Griffin v. Spencer*, 6 Hill, 525; 6 T. & C., 589.) In changing the location of the dam defendant's acts were unlawful, and it may be restrained by injunction. (*Griffin v. House*, 18 J. R., 397; *People v. Collins*, 19 Wend., 56; *Cayuga Bridge Co. v. Magee*, 2 Paige, 116; 6 Wend., 85; *Fitzhugh v. Raymond*, 49 Barb., 645.)

ALLEN, J. Whatever may be the rights of the defendants or either of them to maintain a dam upon the site of that originally constructed in 1829 under the grant from Robert Throup and others, then owners of the lands upon which the same was located, their rights are restricted to that particular site. The right and privilege granted to the hydraulic association was to enter upon and take possession of such piece of land at or near a point designated as might be necessarily occupied and covered by a dam or dyke to be there erected by the grantees. Although the lands upon which the privilege was to be exercised, and which were subject to the easement for the benefit of the association, were not described by metes and bounds, when the grantees located and built their dam, the grant became and was as specific in respect to the land to be occupied under the grant as if they had been particularly described in it. From that time neither the grantors nor grantees could, without the consent of the other parties in interest, change the location of the dam. The grant authorized the construction and maintenance of but one dam, and at a single point to be selected within certain limits, and gave no right to the grantees to

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change the location after having once made the selection and constructed their dam. (*Fitzhugh v. Raymond*, 49 Barb., 645; *Bannon v. Angier*, 2 Allen, 128; *Jennison v. Walker*, 11 Gray, 423; *Jones v. Percival*, 5 Pick., 485; 3 Com. Dig., *Chimin* [D., 5]; *Wynkoop v. Burger*, 12 J. R., 222.) The attempt of the defendants to erect a dam upon the premises of the plaintiff and upon a site distant from that of the original dam was entirely unauthorized.

I see no reason to doubt that the sale by virtue of the judgment and execution against the hydraulic association gave to the purchasers at such sale all the interest of the association in the dam and the land covered by it. The estate and interest of the association in real property, whether a mere easement or a right of possession or title in fee, was the subject of a sale as property distinguished from the incorporeal franchise of the company under the act of incorporation. (*Griffin v. Spencer*, 6 Hill, 525; *Goodrich v. Burbank*, 12 Allen, 459; Angell on Water-courses, § 143.) The purchaser could devote the property to any uses to which it might be appropriated under the grant. The case does not show that the individual defendants, Jacob and Franklin Getz, have succeeded to the rights of the purchasers at the sheriff's sale, and as the hydraulic association have been divested of all their property in the dam and land upon which it was located, it follows upon the case made that there was no right established in the defendants to maintain the dam upon the original site.

The judgment must be affirmed.

All concur.

Judgment affirmed.

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MARY A. WOODGATE, Individually and as Executrix, etc., et al., Respondents, v. MELANOTHON FLEET et al., Appellants.

The validity of a trust to receive and apply the rents and profits of land, the duration of which cannot extend beyond the lives of two designated persons, in being at the time of the creation of the trust, is not impaired by the circumstance that during the authorized period of suspension of the power of alienation, more than two persons are to enjoy the benefits of the income, or that some of the designated beneficiaries are not *in esse* at the time of the creation of the trust.

F. conveyed certain premises to trustees in trust: (1) to receive the rents and profits and apply to the support of his wife M., of J., and of any children of himself and M., thereafter born; (2) upon the arrival of J. at the age of twenty-one, to convey to him and to M., if unmarried, their proportions, to be determined by the number of children then living, the declared intent being to divide the property equally between M., J., and the living children; in case of the death of either, the share to which such person would have been entitled to go to the survivors; (3) if M. should be married when J. became of age, the trust as to her share to continue during her husband's life, and in case she should not survive her husband, her share to be vested in her heirs; (4) the shares of the after-born children to be held for them until they respectively arrived at full age. When J. became of age M. and four children were living. In an action to determine the rights of the parties, *held*, that the first trust and the limitation of the remainder in fee to take effect on J.'s becoming of age were valid, as was also the trust to continue during the life of M.; that the clause making provision in case of the death of one of the beneficiaries referred to a death before the division; that the concluding provision did not create an active trust, authorized by the Revised Statutes, but a mere passive trust under which the title passed directly to the beneficiaries; also, that even if the language could be construed as creating a trust void because of an unauthorized suspension of the power of alienation, it did not defeat the estate limited to the grantor's children.

(Argued March 30, 1876; decided April 11, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of plaintiff, entered upon a decision of the court at Special Term.

This action was brought to determine the rights and equities of the various parties in and to certain real estate situate in Jamaica, Queens county.

On March 24, 1834, Abraham Fleet, being married and

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having an adopted son or "reputed son," as he was styled, executed a trust deed conveying certain lands, including the premises in question, to James H. Hackett and others, in trust, for the purposes declared in said deed as follows:

"To have and to hold the said hereby granted and conveyed premises, unto the said parties of the second part, and to the survivors or survivor of them forever. In trust, nevertheless, and for the use and purposes hereinafter specified and described, that is to say, to receive all the rents, issues and profits of all the said property and estate hereinbefore mentioned and described, and the same to apply in equal proportions toward the support and maintenance of Martha, the wife of the said party of the first part, and the support and education of John K. Fleet, his said reputed son, and of any children of the said party of the first part that may hereafter be born of his said wife, with power to invest whatever moneys may remain in the hands of the said parties of the second part, over and above what may be required for the said purposes in good and profitable securities for the benefit of said wife and children; and in trust, further, upon the arrival of the said John K. Fleet at the age of twenty-one years, to convey to him and the said Martha (provided she shall be then sole and unmarried), their respective proportions of the said estate, or all the right, title and interest of the said party of the first part, of, in and to the several lands and premises hereinbefore mentioned and described, such proportions to be determined by the number of children of the said party of the first part, and his said wife, which shall be living at the time the said John K. Fleet shall arrive at twenty-one years of age. The express intention of said party of the first part, that all the said hereinbefore described property shall go to and be divided among the said Martha, John K., and all lawful children of the said party of the first part, which shall be living at the time the said John K. shall arrive at age, in equal proportions, share and share alike.

"And further, that in the event of the decease of the said Martha, John K., or either of the said children, the share to

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which said party would have been entitled shall be equally divided among the survivors. And it is further provided, that if upon the arrival of the said John K. at the age of twenty-one years, the said Martha shall not be living, sole and unmarried, her share or proportion shall continue to be held by the said parties of the second part, their survivors or survivor, in trust, for her and her benefit so long as her husband shall survive, and as such trustees the said parties of the second part shall account with her and pay over to her from time to time such moneys as she may require for her comfortable support and maintenance; and in case she shall not survive her said husband, her share or proportion of the said estate shall be vested in her heirs. And further, that *the shares* of the said children as may be hereafter born as aforesaid, shall be held in trust for them by the said parties of the second part, until said children shall arrive at lawful maturity; and in trust, further, that if at any time before the said John K. shall arrive at age, it shall, in the judgment of the said parties of the second part, become necessary, they shall have the power to sell and convey the said estate hereby conveyed to them, in trust, or any part thereof, and to execute the necessary deeds of conveyance therefor, and the proceeds of such sale to apply for the benefit of the several parties for whose benefit this trust is created, in manner as is above mentioned and provided."

On the 21st October, 1837, John H. Wingate, plaintiff's testator, obtained a judgment against said grantor, and his interest in the premises in question was sold upon execution issued on said judgment and bid off by Wingate, who received a sheriff's deed. He commenced an action of ejectment, and the *cestui que trust* filed a bill in chancery to determine the validity of the trust deed. The assistant vice-chancellor held the deed to be valid so far as it made provision for the lives of Martha E. and John K. Fleet, but void as to the residue. John K. Fleet and wife, on the 16th February, 1853, conveyed all their interest in the premises to Woodgate.

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This action was commenced in 1855. The wife of the grantor and the children were not originally made parties. Judgment was rendered declaring, in substance, that the trusts for the benefit of the children were void; that the grantor retained the interests not legally conveyed, and that Woodgate acquired under the sheriff's deed the interests attempted to be conveyed to the children. The judgment was reversed by the Commission of Appeals (44 N. Y., 14). Afterward the said four children were made parties defendant. The judgment below was to the effect that the trusts for the benefit of the children were void, and that they had no interest in the property.

*Wm. H. Onderdonk* for the appellants. The trusts created by the deed were valid. (1 R. S., 723, §§ 14, 15; 728, § 55; 729, §§ 60, 61; *Williams v. Williams*, 4 Seld., 536, 537; *Harrison v. Harrison*, 36 N. Y., 543; *Manice v. Manice*, 43 id., 303; *Bradley v. Amidon*, 10 Paige, 288; *Savage v. Burnham*, 17 N. Y., 561; *Gilman v. Reddington*, 24 id., 9; *Post v. Hover*, 33 id., 600; 2 Jar. on Wills [3d ed.], 56; *Woodgate v. Fleet*, 44 N. Y., 12, 13.) The trusts in favor of the children to be born after the execution of the instrument, did not unduly suspend the power of alienation. (1 R. S., 728, § 55; 729, § 58; *Downing v. Marshall*, 23 N. Y., 366; *Post v. Hover*, 33 id., 593; *Schetler v. Smith*, 41 id., 328; *Kiah v. Grenier*, 56 id., 220.)

*Dennis McMahon* for the respondents. The trusts in the deed, so far as regards the after-born children, were invalid. (11 Abb. Pr. [N. S.], 52-54; 44 N. Y., 17; 1 R. S. [o. p.], 729, 730.) The deed suspended the power of alienation unduly. (1 R. S. [o. p.], 723, § 14; *McSorley v. McSorley*, 4 Sand. Ch., 414; *Lange v. Rapke*, 5 id., 363; *Root v. Stuyvesant*, 18 Wend., 257; *Parks v. Parks*, 9 Paige, 107; *More v. Lettell*, 2 Hand, 76; *Sheriden v. House*, 4 Keyes, 589; *Paine v. Reall*, 4 Den., 405; *Burton v. Smith*, 13 Pet., 464; *Hawley v. James*, 16 Wend., 62; 41 N. Y., 334; *Kilpatrick v. Johnson*,



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43 id., 376; *Haxton v. Corse*, 2 B. Ch., 518; *Lorrillard v. Costar*, 5 Paige, 195; *Bascom v. Albertson*, 34 N. Y., 596; *Post v. Hover*, 33 id., 593; *Vernon v. Vernon*, 53 id., 357; 2 Bl. Com., 174, note 21; 2 Lom. Dig., 311; 2 Wash. R. P., 357; *Long v. Blackall*, 7 L. R., 100; Fearn. Rem., 429 note *f.*, 414, note *a*, 526, 530; *Cadell v. Palmer*, 10 Bing., 140; *Pleasants v. Pleasants*, 2 Call., 336; *Earle v. Wilson*, 17 Ves., 528; *Gordan v. Gordan*, 1 Merw., 150-153; *Metham v. Devon*, 1 P. Wms., 529; 2 Lan. Exrs., 35; *Corbet's Case*, 1 Coke, 87 *a*; *Jermyn v. Ancot*, 1 Coe, 85 *a*; *Lade v. Hulford*, 3 Burr., 1416; W. Bl., 428; 1 Amb., 479; 1 Theo. Co. Litt., 506; 1 Prest. Ex., 257, 258; Haiger's L. Tr., 519; *Beauchesh v. Denner*, 2 Ath., 308; *Deel v. Fonnasau*, 2 Doug., 487; *Thompson v. Guffert*, 1 Leigh [Va.], 321; *Reddick v. Cahoon*, 4 Rand., 547; *Tensley v. Jones*, 13 Grat., 289; *Callis v. Kemp*, 11 id., 85; *Bells v. Gillespie*, 5 Rand. [Va.], 279; *Bap. Assn. v. Hart's Ex.*, 4 Wh., 1; *Gallego v. Atty.-Genl.*, 3 Leigh, 450; *Wheeler v. Smith*, 9 How., 80; *Ganey v. Latant*, 4 Leigh, 327; *Vidal v. Gerard*, 2 How., 196.)

RAPALLO, J. After a careful examination of the deed of trust in controversy in this action, and of the adjudications which have been had upon it in the Court of Chancery and in the Supreme Court, we are satisfied that later decisions of this court require us to sustain the limitation in favor of the children of Abraham Fleet who were living when John K. became of age. We are relieved from any difficulty arising from obscurity in the language of the deed. The intentions of the grantor are plainly and emphatically expressed, and the only questions for us to determine are, whether the law will permit them to be carried into effect, or, if they cannot be carried out in every detail, then to what extent they should be effectuated.

The first trust created by the deed is to receive the rents and profits of the property and apply them to the support, etc., of the grantor's wife, of his reputed son, John K. Fleet, and of any children of the grantor and his said wife who



may be born after the date of the deed. The succeeding provisions of the deed clearly show that this trust, although created for the benefit of several persons, is to continue only until John K. Fleet arrives at the age of twenty-one years, and suspends the power of alienation during that period only. A trust to receive and apply the rents and profits of lands, the duration of which cannot extend beyond the lives of two designated persons, in being at the time of the creation of the trust, is permitted by the statute, and its validity is not impaired by the circumstance that during this authorized period of suspension of the power of alienation more than two persons are to enjoy the benefit of the income, or even that some of the designated beneficiaries are not *in esse* at the time of the creation of the trust. This point was expressly adjudicated in *Gilman v. Reddington* (24 N. Y., 9), and the doctrine is recognized in *Manice v. Manice* (43 id., 386).

The next direction of the deed is, that upon the arrival of John K. Fleet at the age of twenty-one years, the trustees convey to him and to the grantor's wife, Martha (if then sole), their respective proportions of the estate, such proportions to be determined by the number of children of the grantor and his wife who shall be living when John K. arrives at the age of twenty-one years, the grantor declaring it to be his express intention that the property shall go to and be divided among the said Martha, John K., and all lawful children of the grantor who shall be living at the time John K. shall arrive at age, in equal proportions, share and share alike.

This limitation of the remainder in fee, to take effect on John K. becoming of age, is clearly free from objection, and if the provisions of the deed ended here, no question could be raised as to its validity.

The next provision is, that in the event of the decease of said Martha, John K., or either of the children, the share to which such party would have been entitled shall be equally divided among the survivors. Taken in connection with all

the other provisions of the deed, it is quite apparent that this refers to a death before the division, as it disposes of the share to which the party dying would have been entitled if living. Some doubt may exist as to what the testator's intention was in case John K. had died before attaining the age of twenty-one years, but as it appears that all the parties have lived beyond that term, no question arises under this provision.

The deed then provides that if, when John K. arrives at age, the said Martha shall not be sole and unmarried, her share shall continue to be held by the trustees, in trust for her, so long as her husband shall survive; and in case she shall not survive her husband, her share shall, on her death, be vested in her heirs. This provision is entirely free from objection, as it would have been lawful in the first instance to have created a trust to continue during the lives of Martha and John K., and by this disposition her share must, in any event, vest absolutely in some one on her decease.

Thus far, the deed appears to be entirely free from any provision which could possibly suspend the power of alienation beyond the prescribed period. The whole difficulty which the courts have encountered lies in the next and concluding provision, viz.: that the shares of the children born after the making of the deed shall be held in trust for them until they arrive at majority.

It is sufficiently plain that the meaning of this provision is, that the share of each child shall be held in trust until such child becomes twenty-one years of age. If words had been used creating one of the trusts authorized by the Revised Statutes in the share of each of these after-born children, during minority, such trust would be illegal, inasmuch as it would suspend the power of alienation of each share during a portion, at least, of a life not in being at the time of the creation of the estate, and the statute allows such suspension only during the continuance of lives in being at the time of the creation of the estate. The only exception to this rule is where the suspension is caused by a contingent

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limitation of a remainder upon a prior remainder in fee, the contingency being the death of the first remainderman under age. (1 R. S., 723, §§ 15, 16; id., 726, § 37.) That exception does not apply to the present case. The material questions here are: First, whether the words of the deed are such as would create one of the authorized trusts; and, secondly, whether the effect of declaring such trust illegal, as causing an unauthorized suspension of the power of alienation, would be to defeat the whole estate limited to the grantor's children, or merely to defeat the trust attempted to be created during their respective minorities.

We think that both of these questions should be determined in favor of the appellants. The direction in the deed is simply that the shares of the after-born children shall be held in trust for them, by the parties of the second part, until said children shall arrive at lawful maturity. No power to receive or apply rents is given, nor are the former trusts referred to in any manner; nor is it even said that the parties of the second part shall continue to hold as before, but simply that the shares shall be held in trust, no trust being specified. Such language is, we think, insufficient to create any active trust authorized by the statute, or any but a mere passive, naked trust, to hold, under which the title would pass legally to the beneficiary.

But, assuming that the language were capable of being so construed as to create a trust to receive and apply rents, should the attempt to create that trust wholly defeat the provision made by the grantor for his children? Under the later decisions of this court, the doctrine has been adopted, that the general intent of a testator or grantor may be sustained by cutting off a void trust, which is separable from other valid trusts and dispositions, and not an essential part of the general scheme. (*Harrison v. Harrison*, 36 N. Y., 543; *Manice v. Manice*, 43 id., 384, and authorities cited.) Now, in the present case, the grantor declared, in the most explicit manner, his intention that all the property mentioned in the deed should go to and be divided among his wife, Martha,

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his reputed son, John K., and all other lawful children of the grantor living when John K. should arrive at age, in equal shares. These grantees were to take absolutely, and in their own right, except only that if Martha should be a married woman at the time of the division, her share should be held in trust for her so long as she continued covert; and as to the younger children, a direction was superadded to the gift to them, that their shares should be held in trust for them during their infancy. This was a merely temporary provision, not practically affecting the general scheme of the deed. If the land had been given in trust to receive the rents and apply them to the use of the children during their lives, and no interest had been given them except as beneficiaries under such a trust, the case would have been different. But, under this deed, the property was in the first place given to the children absolutely, in equal shares. They were, at all events, to come into possession of their shares when they became of age, and hold them in fee; during their infancy they could not have disposed of them if there had been no trust, and the practical difference was very little whether, during that period, the property should be managed for them by a trustee or a guardian. If the direction to hold in trust during infancy be rejected as void, the direction to divide among these children remains, and even if regarded as a gift to them on their arriving at age, this would be sufficient to vest the estate in them; and the failure of the trust, which was to continue only during their infancy, should not invalidate the whole limitation to them. It was a merely incidental and practically immaterial provision, the failure of which should not defeat the main intent of the grantor. I think this very point was decided in the case of *Manice v. Manice*. In that case there was a devise and bequest to unborn grandchildren, to take effect in possession when they should become of age, but a trust was created to accumulate the income during the infancy of each grandchild. This trust for accumulation was held void as to the personal estate, but the effect was adjudged to be not to destroy the bequest, but to vest the

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personalty absolutely in the grandchildren on the death of their mother discharged of the trust. That decision governs this case, even if it should be held that a trust was created in the shares of the children of Abraham Fleet, to continue during their respective minorities.

When this deed was before Assistant Vice-Chancellor HOFFMAN, he was of opinion that the limitation to after-born children was invalid, for the reason that no provision is made for the case of the death of John K. Fleet before twenty-one; and that in that case the deed would operate to keep up a trust for the after-born children during their lives. It is difficult to see how any such result could possibly follow; or how, under any circumstances, any trust for the after-born children could, under the terms of the deed, continue longer than during their respective minorities. But the further difficulty in the way of the construction claimed by the learned assistant vice-chancellor is, that if the case of the death of John K. Fleet before coming of age is unprovided for, the limitation to after-born children would have failed entirely in that event, as it is only those living at the time he should become of age who were entitled to take.

Judge STRONG, when the case came before him, did not sustain the views of the assistant vice-chancellor, but placed his judgment on the ground that a trust was created for the after-born children, which created an illegal suspense of the power of alienation, and rendered the whole limitation void. If such a trust was created, and was inseparable from the other dispositions in favor of their children, the result at which Judge STRONG arrived, would of course follow. But, according to the view we take of the deed, it did not create such a trust, and if it did, the cases decided in this court since the opinion of Judge STRONG was delivered, establish the doctrine that the trust may be adjudged void without invalidating the other dispositions, if separable from them, and not an essential part of the scheme of the grantor.

When the case was in the Commission of Appeals the question was not decided, and it was not until after the

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decision of the commission that the children born after the execution of the deed of trust were made parties to the action. None of the previous judgments are binding upon them, and they now have the right to claim their interests under the will. We think that, on John K. Fleet attaining the age of twenty-one years, these children became vested with the title to four undivided sixth parts of the property conveyed, free from any trust, and that no interest therein remained in the grantor, Abraham Fleet.

The judgment must therefore be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed

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JOHN E. RISLEY, Appellant, v. WILLIAM H. SMITH et al.,  
Respondents.

Where a party, for a valuable consideration, gives to another an order payable out of a fund not then in existence, such party cannot, by his own default, prevent the creation or realization of the fund and interpose the absence or failure of the fund as a defence to an action upon the order; so where an order is drawn upon a fund, to be paid upon the happening of a certain condition, which order is accepted, the acceptor cannot, by his own act, defeat the condition and then set it up as a defence in an action upon the acceptance.

Plaintiff was employed by the I., C. and D. R. R. Co. to find contractors to build its road. He procured defendants to agree to enter into such contract. It was agreed that the company was to pay, as part of the consideration for the work, \$250,000. At the close of the negotiation and when the agreement was being reduced to writing, it was further agreed that the sum to be paid defendants should be increased to \$255,000; that defendants should give to plaintiff, as compensation for his services, their order on the company for \$5,000, payable *pro rata*, as the money became due under the contract. The agreement was carried out, the contract executed and the order given and accepted by the company. The contract was subsequently, and before any money became due under it, surrendered by defendants and canceled. In an action to recover the amount

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of the order, *held*, that it was given for a good consideration, and could not be defeated by default of the defendants; and that defendants were liable.

*Risley v. Smith* (7 J. & S., 137) reversed.

(Argued March 31, 1876; decided April 11, 1876.)

APPEAL from order of the General Term of the Superior Court of the city of New York, setting aside a verdict in favor of plaintiff and granting a new trial. (Reported below, 7 J. & S., 137.)

This action was brought to recover the amount of a draft or order, signed by defendants, of which the following is a copy :

“ \$5,000.

NEW YORK, *July* 13, 1867.

“ For value received, pay to the order of John E. Risley five thousand dollars *pro rata*, as the money shall become due to us under our contract with you of this date, and charge the same to the account of

“ Yours truly.

“ W. H. SMITH.

“ CHARLES KING.

“ CONDE R. ALTON.

“ *To S. C. WILLSON, as President of the Indianapolis, Crawfordsville and Danville Railroad Company.*”

Which order was accepted by the drawee.

Plaintiff was employed by said company to find contractors to build its road. He opened negotiations with defendants, and procured them to agree to enter into a contract. A meeting was held between them and said Willson, as president of the company, whereupon it was substantially agreed that defendants would do the work, the company to furnish defendants the right of way, and transfer to them all work already done; “ all the franchises, rights, and property of, and belonging to, the said Indianapolis, Crawfordsville and Danville Railroad Company ” to become the property of defendants when they should have completed the road, they to receive in addition in money, city and county bonds, mortgage notes and

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cash subscription (contributed by parties residing in the vicinity of the road), a bonus of \$250,000, payable in *pro rata* installments as the work progressed; and the entire road to be completed by the 4th of July, 1870.

At this meeting the question of plaintiff's compensation came up, when it was acknowledged that \$5,000 would be a fair remuneration for his services. It was also suggested that, as by the contemplated contract the company would divest itself of all its available assets, by turning them over to the defendants, the latter should undertake to pay the plaintiff. Defendants objected to this, but finally expressed their willingness, if the bonus should be increased from \$250,000 to \$255,000, to give the plaintiff a draft on the company for \$5,000, payable *pro rata* out of the moneys to become due to the defendants as they progressed with the work under the proposed contract. This was finally acceded to. Further subscriptions were procured to cover the increase, and the contract was completed and executed at the date of the order. The order was executed, accepted by Willson as president, and delivered to plaintiff. Defendants began work, but before any portion of the moneys became due under it, they abandoned the contract without plaintiff's knowledge or consent, and the same was surrendered and canceled. After the time had elapsed within which the moneys would have become due and payable, had the contract been fulfilled, this action was brought. Evidence was given upon the trial, to the effect that plaintiff should give a portion of the \$5,000 to the president of the company.

Defendants' counsel moved for a dismissal of the complaint, on the ground that no liability on their part had been shown. The motion was denied, and said counsel duly excepted.

The defendants' counsel asked the court to submit to the jury the following proposition, among others: If the jury find that the draft was given to the plaintiff to enable him to collect from the company money due him from the company, and not as an evidence of indebtedness from the defendants to the plaintiff, they should find for the defendants. If the



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jury find that the draft was given in the form of a draft for the plaintiff's convenience to enable him to collect the money from the company, the plaintiff cannot recover. The requests were denied, to which the defendants duly excepted.

The court directed a verdict for the plaintiff, to which exception was duly taken. Exceptions were ordered to be heard at General Term, in the first instance.

*James Clark* for the appellant. The burden of proving that the consideration for the draft was not valid was upon defendants. (*Jerome v. Whitney*, 7 J. R., 321; *Hinman v. Moulton*, 14 id., 406; *Jackson v. Alexander*, 3 id., 484; *Walrod v. Petrie*, 4 Wend., 576; *Prindle v. Caruthers*, 15 N. Y., 425, 431.) The \$5,000 added to the bonus agreed to be paid to defendants constituted a valid consideration for the draft. (1 Pars. on Con., 448; *Miller v. Drake*, 1 Cai., 45, 46; *Briggs v. Tillotson*, 8 J. R., 304; *White v. Demilt*, 2 Hall, 436; *Funk v. Hough*, 29 Ill., 145; *Downy v. Hinchman*, 25 Ind., 453; *Menally v. White*, 3 Metc. [Ky.], 584; *Babcock v. Wilson*, 17 Me., 372; *Appleton v. Chase*, 19 id., 74; *Whitehead v. Potter*, 4 Ire., 257; *Soc. in Troy v. Perry*, 6 N. H., 164; *George v. Harris*, 4 id., 533; *Forney v. Shipp*, 4 Jones [N. C.], 527; *Nott v. Johnson*, 7 Ohio St., 270; *Abrams v. Suttles*, Busbee [N. C.], 99; *N. Y. and N. H. R. R. Co. v. Pexley*, 19 Barb., 428; 1 Smith's L. C. [m. p.], 224; 1 Story on Con., §§ 450, 451 b; *Farley v. Cleveland*, 4 Cow., 432; *Barker v. Bucklin*, 2 Den., 42; *Stewart v. Trustees of Ham. Col.*, id., 403, 417; *D. and H. Canal Co. v. West. Bk.*, 4 id., 97; *Tippee v. Bichnell*, 3 Bing. [N. Cas.], 710; *Webb v. Rhodes*, id., 732; *Arnold v. Lyman*, 17 Mass., 381; *Carnegie v. Morrison*, 22 Metc., 381; *Lawrence v. Fox*, 20 N. Y., 268.) Extension of time to one party is a good consideration for the promise of another. (*Thompson v. Gray*, 63 Me., 228; Theob. Law of P. and S., 6; 1 Law Lib., 4; *Pullin v. Stokes*, 2 H. B., 312; 2 Pars. on Con., 683; *Bangs v. Mosher*, 23 Barb., 478; *Tobey v. Barber*, 5 J. R., 68, 72, 73; *Alb. City F. Ins. Co. v. Davendorf*, 43 Barb.,

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444; *Place v. McIlwaine*, 1 Daly, 266; 38 N. Y., 96; *Putnam v. Lewis*, 8 J. R., 389; *Myers v. Wells*, 5 Hill, 463; *Hart v. Hudson*, 6 Duer, 249.) Through the drawing and delivery of the draft by defendants, and its written acceptance by the company, plaintiff became an equitable assignee of an interest in the contract between defendants and the company. (*Noel v. Murray*, 13 N. Y., 167, 168; *Young v. Stapleton*, 34 id., 258, 265; *Vreeland v. Blunt*, 6 Barb., 182; *Peyton v. Hallett*, 1 Cai., 364, 379; *McMenomey v. Townsend*, 3 J. R., 71; *Bradley v. Root*, 5 Paige, 632; *Crocker v. Whitney*, 10 Mass., 319; *Cutts v. Perkins*, 12 id., 211.) Defendants' surrender of the contract without plaintiff's consent was a breach of their obligation to him, which rendered them liable for the amount secured by the draft. (*Worden v. Dodge*, 4 Den., 159; *Hatch v. Pryor*, 3 Keyes, 441, 443.)

*Thomas H. Rodman* for the respondents. The draft was not a bill of exchange or subject to the law merchant. (*Cook v. Satterlee*, 6 Cow., 108; *Morton v. Naylor*, 1 Hill, 583; *Van Wagner v. Terrett*, 27 Barb., 181; *Alger v. Scott*, 54 N. Y., 14.)

EARL, J. It is agreed upon both sides that the instrument of July 13, 1867, drawn by defendants upon the president of the railroad company, is not a bill of exchange, but that it operates as an assignment of the fund upon which it is drawn to the extent of \$5,000. And the only question for our consideration is the obligation assumed by the defendants by this instrument under the circumstances surrounding its execution.

The railroad company owed the plaintiff something for services in procuring the defendants to enter into a contract to build its road; the amount to be paid him had not been liquidated. At the time the negotiations between the defendants and the president of the railroad company were substantially closed, the question of plaintiff's compensation came up. As all the assets of the company were to go to

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the defendants under this contract to build the road, it was a matter of consideration how the plaintiff should be paid. It was first suggested by the president of the company that the defendants should pay him out of the \$250,000 which they were to receive under their contract. This they declined to do, and it was then arranged that the company should increase its available assets \$5,000, and agree to pay defendants for building the road (besides giving them the road and all its franchises when built) the sum of \$255,000; and then they would give the plaintiff the draft of July thirteenth. This arrangement was carried out; the contract was executed and the draft was given and accepted at the same time. The substance of the arrangement was, that the contract-price to be paid the defendants for building the road was increased \$5,000, in consideration that they would assume and pay the plaintiff the sum of \$5,000 out of the moneys to be paid to them on their contract. The mode of payment was specified in and arranged by the draft.

There was abundant consideration for the draft and every obligation which it imposes upon the defendants. The plaintiff agreed to take his pay in this way, and for the time being, at least, he was confined to his remedy upon the draft. This furnished a consideration. But further, the defendants received a contract from the company to pay them \$5,000 more for their undertaking in consideration that they would pay out of it this sum to the plaintiff. If the defendants had absolutely agreed to pay the plaintiff this would have been an ample consideration to uphold the agreement. If they had gone on and performed their contract with the railroad company, and the money under their contract had thus become due and payable, they could not have repudiated this draft and defeated its payment on the ground that there was a want of consideration. The obligation of the defendants to pay was not, however, absolute, but conditional. If, without their fault, no money became due under the contract, the \$5,000 could not be paid. If the railroad company had prevented them from performing, then they would have been

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absolved from any liability, and the company would have been liable upon its acceptance. But can they give this draft and then set up their own default to defeat its payment? We think not. For a sufficient consideration they gave this draft, payable out of a particular fund, and they cannot, by their own default, prevent the creation or realization of that fund, and then set up the absence or failure of the fund as a defence to this action. Having, by their own fault, prevented the condition from arising which would make the payment to the plaintiff due, they are estopped from setting up the failure of the condition to defeat the plaintiff's claim. (*Gallagher v. Nichols*, 60 N. Y., 438, 448.)

But there is another view: the fund may be treated as in existence, in the possession of the acceptor, to be transferred to the plaintiff upon the happening of a condition. The acceptor could not by its act defeat the condition and then set it up as a defence to plaintiff's claim when sued upon its acceptance. So, the fund was to be transferred to the plaintiff upon the performance of a certain condition by the defendants, and they cannot defend by setting up their own voluntary non-performance. Defendants' obligation, as thus defined, grows out of the whole transaction. The two parties to the draft, the drawer and acceptor, certainly incurred some obligation by what was done; they were parties to the scheme to pay the plaintiff, and that scheme was embodied in the draft and the contract. It must have been understood by the plaintiff that he was to get his pay through the scheme; and the other parties must have intended that he should thus get his pay. It cannot be supposed that either of the other parties intended to reserve the right to nullify the scheme at will at any time. It was a part of the scheme that the other parties should perform all their obligations then entered into to create or transfer the fund drawn upon. They each assumed an obligation to the plaintiff to act in good faith toward him in carrying out the scheme, and not to defeat it by any mere default.

These views dispose of the merits of this case, and it is

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only necessary to say further, that the fact that the plaintiff was to pay a share of the \$5,000, when realized by him, to other parties, does not affect his right of action for the whole sum.

The order of the General Term must be reversed and judgment ordered for plaintiff upon the verdict, with costs.

All concur.

Order reversed and judgment accordingly

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MATTHEW McCOURT, Plaintiff in Error, v. THE PEOPLE OF  
THE STATE OF NEW YORK, Defendants in Error.

Where there are to the cellar-way of a dwelling-house two doors, one opening outwardly, the other opening into the cellar, the latter is an outer door of the house, and if closed and latched, the unlatching and entering constitutes a breaking and entry, within the meaning of the statute relating to burglary. (2 R. S., 668, § 10, *et seq.*)

Plaintiff in error, with two companions, stopped at the house of C. in the day-time. He asked C.'s daughter, who was alone at home, for a drink of cider, offering to pay for it. She refused to let him have it, and he thereupon opened the cellar door, although forbidden to do so by her, went in and drew some cider. He had procured cider there before, and was partially intoxicated at the time. He was indicted for burglary and larceny. Upon the trial his counsel requested the court to direct an acquittal, which was denied. *Held*, error; that the evidence failed to show that the accused entered with intent to commit a crime; that while there was an evidence of an intent to obtain a drink of cider and thus to deprive C. of his property, there was an absence of the circumstances ordinarily attending the commission of a larceny, and which distinguish it from a trespass, and that all the circumstances were consistent with the view that the transaction was a trespass merely.

Every taking by one person of the personal property of another without the consent of the latter, without right or claim of right, and with intent to appropriate it, is not larceny; there must also be a felonious intent.

(Argued April 8, 1876; decided April 11, 1876.)

ERROR to the General Term of the Supreme Court in the third judicial department to review a judgment of the Court of Sessions in and for the county of Essex, entered upon a

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verdict convicting plaintiff in error of the crime of burglary and larceny.

The indictment contained three counts: First. Burglary in the second degree. Second. Burglary in the third degree. Third. Larceny. The intended crime charged in each count was to steal cider.

On the 30th September, 1871, between eight and eleven A. M., plaintiff in error, with his brother and another companion, stopped at the house of the prosecutor, Hinckley Cole, who was then absent from home. The prisoner was partially intoxicated; he had before stopped at the house and procured cider. The daughter of Cole came to the door, and he asked her for some cider, offering to pay for it. She refused to let him have any. There were two doors to the cellar, one opening out, the other about eighteen inches distant opening into the cellar. The evidence on the part of the prosecution tended to show that the latter was shut and latched. The prisoner said he would have some cider any way, and started to go down cellar. Miss Cole forbade him, and ordered him to leave the premises, but he went on into the cellar and drew some cider in a pail. His brother followed him into the cellar, took the cider away, and succeeded in getting him away from the premises.

At the close of the evidence the prisoner's counsel requested the court to direct an acquittal. This the court refused, and said counsel duly excepted. The jury rendered a general verdict of guilty.

*Samuel Hand* for the plaintiff in error. There was no evidence of breaking and entering to sustain the verdict. (2 R. S., 668, §§ 10, 11; *id.*, 669, § 20; *People v. Bush*, 3 Park., 552; *People v. Fralick*, Lalor [H. & D.], 63.) Even if the entry was technically a breaking in, by reason of the door being latched, it was not burglarious. (*Dobb's Case*, 2 E. P. C., 513; *Crocheron's Case*, 1 City H. Rec., 177; Urath. Dig., C. L. Burg., 48; *Rex v. Holloway*, 5 C. & P., 524; 1 Colby Cr. L., 535; 4 Black. Com., 227; 1 Russ., 822, 823; *Comfort v.*

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*Fulton*, 39 Barb., 56.) There was nothing to justify a finding that a larceny was committed, or attempted or intended. (4 Black. Com., 241; 2 Russ., 8; 1 Hale, 509; *Hadley's Case*, 5 City H. Rec., 8; 1 id., 177; *Johnson v. People*, 4 Den., 364; *Payne v. People*, 6 J. R., 103; *People v. Caryl*, 12 Wend., 547; 2 R. S., 668, § 10, subd. 1, § 11; Laws 1863, chap. 244.)

*Nathaniel C. Moak* for the defendants in error. There was a sufficient breaking in to constitute a burglary. (2 R. S., 668, § 13; 2 Edm. Stat., 668; id., 669, § 18; 2 Whart. Cr. L. [7th ed.], §§ 1535, 1538; *Butler v. People*, 4 Den., 70; *Thompson v. People*, 3 Park., 213.) The court properly refused to charge that there was no evidence of a taking or carrying away of property. (2 Bish. Cr. L. [5th ed.], §§ 95, 97; id., §§ 794–797; 2 Whart. Cr. L. [7th ed.], § 1810; *Rex v. Lapier*, 1 Leach [4th ed.], 320; *Reg. v. Simpson*, Dearsby C. C., 421; 6 Cox Cr. C., 401.) It was not error for the court to instruct the jury that if the accused intended feloniously to deprive the owner of his property, although he did not intend to appropriate it, he was guilty. (*Reg. v. Halloway*, 2 C. & K., 944, 935; 2 Bish. Cr. L. [5th ed.], § 343; 1 id., § 342; *Comm. v. Mason*, 105 Mass., 163; *Comm. v. Tenney*, 97 id., 58, 59; *Comm. v. Coe*, 115 id., 422.) It was proper to refuse to charge that the fact that the offence was committed in the day-time, and in the presence of those in possession of the premises, would prevent a conviction. (*Chisser's Case*, T. Raym., 276; *Bealey v. Sampson*, 9 Vent., 84; Kel., 83; Burns' Justice [30th ed.], 223; Alison Prin. L. Scotland, 264, 265; Barb. Cr. L. [2d ed.], 175.)

ANDREWS, J. There was evidence authorizing the submission to the jury of the question whether the prisoner gained admission to the cellar by opening the door from the cellar-way. This door was an outer door of the house. The fact that there was another door opening outwardly before reaching it, did not make it an inner door of the house. Like a



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storm-door, the outer door was a barrier to the approach to the outer door of the house, and access to the house could not be obtained until the second door was opened. If, therefore, the prisoner in entering the cellar unlatched the door immediately communicating with it, there was a breaking and entry which would constitute burglary, provided the other constituent of the offence was made out, viz., that the prisoner entered with the intent to commit a crime. (2 R. S., 668, §§ 13. 18.)

The material question in the case is, whether the evidence justified the finding of the jury that the prisoner broke and entered the cellar with intent to steal cider therein ; which is the intent charged in the indictment. The breaking and entry was not a substantive offence ; and if the evidence was insufficient to show that it was done with intent to commit a larceny, the judge should have directed an acquittal. Every taking by one person of the personal property of another, without his consent, is not larceny ; and this, although it was taken without right, or claim of right, and for the purpose of appropriating it to the use of the taker. Superadded to this, there must have been a felonious intent, for without it there was no crime. It would, in the absence of such an intent, be a bare trespass, which, however aggravated, would not be crime. It is the criminal mind and purpose going with the act which distinguishes a criminal trespass from a mere civil injury. (1 Hale's P. C., 509.)

Whether the criminal intent existed in the mind of a person accused of crime at the time of the commission of the alleged criminal act, must of necessity be inferred and found from other facts which in their nature are the subject of specific proof ; and for this reason it is, that the other constituents of the crime being proved, it must, ordinarily, be left to the jury to determine, from all the circumstances, whether the criminal intent existed.

In some cases the inference is irresistible, and in others it may be, and often is, a matter of great difficulty to determine whether the accused committed the act charged with a



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criminal purpose. But there are usually found in connection with an act done, which is charged to be criminal, attending circumstances which characterize it, and if these are absent, or the circumstances proved are consistent with innocence, a conviction cannot be safely allowed.

In this case the accused entered the cellar without right and against the protest of the prosecutor's daughter, with intent to obtain a drink of cider, and in that way to appropriate it to his own use and deprive the prosecutor of his property. So, if in passing through the prosecutor's orchard he had, without the consent and against the will of the owner, picked from the ground an apple and eaten it, the act would meet the general definition of larceny, to wit, a taking of the personal property of another, without his consent, and appropriating it to his own use with design to deprive the owner of it. Larceny might be predicated of such a transaction, but if it appeared the act was done openly, in the day-time, in the sight of the owner, a jury would not be called upon to convict; and the court might properly so advise them and direct an acquittal. In the case supposed the act would be a plain trespass, and the circumstances proved would be consistent with a design on the part of the accused to commit a trespass, and there would be an absence of circumstances usually accompanying a felonious taking.

In the case before us the accused was guilty of a rude and aggravated trespass. He persisted in entering the cellar to draw cider although forbidden to do so by the prosecutor's daughter. He offered to pay for it if she would furnish it. He had procured cider at this house before, and he was partially intoxicated. But these circumstances were no justification of his act; the daughter had a right to refuse to give him cider, and his offer to pay for it gave him no right to take it by force; and his intoxication, while it may to some extent account for his conduct, did not mitigate his offence or excuse his crime, if one was committed. But there was an absence of the circumstances which ordinarily attend the commission of larceny and which distinguish it from a mere

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trespass. There was neither fraud, stratagem or stealth. The value of the cider which he intended to take was trivial, and the whole transaction was open, in the day-time, and in the presence or within the observation and knowledge of the prosecutor's daughter. The people gave in evidence the declaration of the accused, made to the prosecutor a short time after the transaction, on the occasion of the settlement of the civil damages, in answer to an inquiry, what his object was in so conducting himself at the house, that he was "rum crazy;" and this was very likely the truth. There was not only an absence of the usual *indicia* of a felonious taking, but all the circumstances proved are consistent with the view that the transaction was a trespass merely. To find this transaction a larceny it is necessary to override the ordinary presumption of innocence and to reject a construction of the prisoner's conduct, which accounts for all the circumstances proved without imputing crime, and to impute a criminal intention, in the absence of the ear-marks which ordinarily attend and characterize it. The accused was convicted of burglary and larceny and was sentenced to two years in the State prison. There was not, we think, sufficient evidence to warrant the conviction, in that it did not justify an inference that the accused acted with a felonious intent.

We cannot sustain the conviction without confounding the distinction between criminal acts and such as, however reprehensible, involve only a violation of private rights, and injuries for which there is a remedy only by civil action.

The refusal of the court to direct an acquittal was error, for which the conviction should be reversed.

All concur.

Judgment reversed.

## Statement of case.

PETER REYNOLDS, Respondent, v. ALEXANDER P. ROBINSON  
et al., Appellants.

Where a married man takes boarders into his house or converts it into a hospital for the sick, and his wife takes charge of his establishment or renders services in the house to boarders or sick persons, in the absence of proof of any special agreement, all her services and earnings belong to her husband, and he can maintain an action to recover therefor.

*Brooks v. Schuerin* (54 N. Y., 848) distinguished.

Where an agreement is made between two parties that compensation for services rendered by one to the other shall be made by a provision in the will of the latter, in case a provision is made sufficient only to compensate in part for the services, the party rendering them has, after the death of the other, a cause of action for the balance against his personal representatives.

In an action to recover for services rendered to a boarder sick with cancer, evidence on the part of plaintiff was received, under objection, that the health of his wife was injured by the stench of the cancer. *Held*, no error; that the evidence was competent, not to lay a foundation for recovery for the loss of health, but to show the nature of the services. Physicians who knew the value of services in nursing cancer cases, and who were acquainted with the case, were permitted to give their opinion as to the value of the services in dressing the cancer and caring for the sick person. *Held*, no error.

A physician, who had testified to his knowledge of cancer cases and of the value of services in caring for them, who also testified to having heard the evidence of other physicians who had treated and who described the cancer, and had heard the testimony of plaintiff's wife read, but who had no personal knowledge of the case, was asked: "What would be the value of the services rendered by her in nursing and dressing the cancer?" This was objected to, and the answer received under exception. *Held*, error; as the question called upon the witness to assume the correctness of, and to draw inferences from the evidence of other witnesses; that his opinion should have been obtained by stating to him an hypothetical case.

(Argued April 8, 1876; decided April 11, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought to recover the value of services

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| 64  | 589 |
| 121 | 256 |

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| 64  | 589 |
| 130 | 499 |

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| 64  | 589 |
| 136 | 9   |
| 136 | 518 |
| 136 | 622 |

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| 64  | 589 |
| 158 | 301 |

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|-----|-----|
| 64  | 589 |
| 165 | 594 |

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alleged to have been performed by plaintiff and his wife in caring for defendant's testator, James Hill.

Said Hill was a farmer living in Argyle, Washington county. In 1855 he adopted Lovella Hughes and brought her up as his daughter. She married the plaintiff in January, 1863. After the marriage, plaintiff took Hill's farm to work on shares, and in 1867 purchased it. Hill continued to live with plaintiff, paying for his board. The referee found that from the commencement of the year 1863, up to the time of Hill's death, which occurred in 1871, he was afflicted with a cancer, and by reason thereof required a great deal of care, nursing, bathing, and washing of linen and clothing. That plaintiff's wife, during this time, save for a short period before his death (when a nurse was employed), rendered these services, which were performed at the request of Hill, who promised to pay what they were worth. That the services were difficult and required great care and attention, which were given, and that the services were worth \$4,342. The evidence tended to show that Hill was to compensate for the services by making a provision for plaintiff's wife in his will. He did bequeath to her \$1,500.

Upon the trial, a physician called for plaintiff, after giving a description of the cancer, and stating the nature of the services performed by plaintiff's wife, was asked the question: "State what effect, if any, was produced upon the health of Mrs. Reynolds?" This was objected to as immaterial; objection overruled and defendants' counsel excepted.

Several physicians, who had been acquainted with the testator, were familiar with the cancer and with the service required, and who testified to their knowledge of the value of such services, were asked how much, in their opinion, it was worth to dress the cancer each time; and also, how much, in their opinion, it was worth to care for and nurse the testator exclusive of the dressing, and also including it; and how much it was worth to nurse the testator and dress the cancer twice a day for a period of six years before his death. These questions were objected to; the objections were overruled and

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answers received, to which defendants' counsel duly excepted. One of the physicians, Dr. Maynard, had never seen the testator. He testified in substance that he had been a physician and surgeon twenty-seven years; that he had treated many cases of cancer, and was acquainted with the value of services in dressing them and nursing the patients; had heard the testimony of two other physicians, Drs. Martin and Moneypenny, and heard their description of the cancer; also, that he had heard read the testimony of plaintiff's wife. He was then asked: "What would be the value of the services rendered by her in nursing, and dressing the cancer of Mr. Hill, during the last six years of his life?" This was objected to by defendants' counsel upon the following grounds:

"The witness shows no knowledge of the value of such services when rendered; is not shown to know any thing of the services in question, except as instructed by the evidence read him, and is incompetent, under such circumstances, to testify what the services are worth; that such testimony, under the circumstances, is inadmissible; witness is not shown to be acquainted with the market value of the services rendered in this case; that such services are not to be reckoned in their value by the worth of each dressing, but by the general worth of the services of a nurse, competent to do all the needed dressings; that the witness must state facts and not opinions, and the question calls for no fact, but an opinion of the witness." The objections were overruled and answer received, to which said counsel duly excepted.

Further facts appear in the opinion.

*Esek Cowen* for the appellants. No implied contract will arise to pay for services rendered by and between members of the same family. (*Williams v. Hutchinson*, 3 N. Y., 312; *Hall v. Finch*, 29 Wis., 278; 9 Am. R., 559; *Andrews v. Foster*, 17 Vt., 556; *Ruckman's Appeal*, 61 Penn., 251; *Duff v. Duffy*, 4 id., 399.) There was no express contract to pay plaintiff's wife any particular amount for her services or what they were reasonably worth. (*Shirley v. Vail*, 38 How., 409;

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*Canger v. Van Aernum*, 43 Barb., 602; 32 Ind., 42; 61 Penn., 251.) The action cannot be maintained because the services were rendered under the expectation that compensation therefor would be provided for in Mr. Hill's will. (*Robinson v. Raynor*, 28 N. Y., 494; *Patterson v. Patterson*, 13 J. R., 379; *Jacobson v. La Grange*, 3 id., 199; *Eaton v. Benton*, 2 Hill, 578; *Osborn v. Gouv. Gray's Hospital*, 3 Str., 728.) This action could not be maintained by plaintiff. (*Brooks v. Schwerin*, 54 N. Y., 343, 348; *Adams v. Curtis*, 4 Lans., 164.) The referee erred in receiving evidence as to the effect of her services on the health of plaintiff's wife. (*Baird v. Gillett*, 47 N. Y., 186; *Williams v. Fitch*, 18 id., 546; *Worrall v. Parmelee*, 1 id., 519.) The referee also erred in receiving the testimony of Dr. Martin. (*Carpenter v. Blake*, 2 Lans., 206; *People v. Lake*, 12 N. Y., 358.)

A. D. Wait for the respondent. Plaintiff could maintain this action. (*Lewis v. Trickey*, 20 Barb., 387; Reeves' Dom. Rel. [Parker's ed.], 138, m. p., 63; *Filer v. N. Y. C. R. R. Co.*, 49 N. Y., 56; *Blow v. Kiah*, 6 N. Y. S. C. R., 464; *Brooks v. Schwerin*, 54 N. Y., 348.) Upon a failure to provide for payment of the services in the will, Mrs. Reynolds was entitled to compensation from the estate. (*Robinson v. Raynor*, 28 N. Y., 494; 36 Barb., 128.)

EARL, J. After the marriage of the plaintiff with Miss Hughes, January 1, 1863, he took the testator's farm on shares, and continued to occupy it until 1867, when he bought it. From 1863 to the time of his death in November, 1871, with the exception of short intervals, the testator boarded with him, and paid for his board at the rate of three dollars per week. Hence, there is little room for saying that he was simply living with plaintiff as a member of his family, and that the services were rendered by plaintiff's wife gratuitously, as an adopted daughter. Besides, the referee found, upon sufficient evidence, that the services were rendered upon the express request of the testator, and his promise to pay for them.

Plaintiff's wife rendered the services in his house to a boarder therein. She was engaged in no business or service on her own account. She was in charge of his household, and, as part of her household duties, rendered the services to a person in her husband's house by contract with him. She was then working for her husband, and not for herself, or on her own separate account. Notwithstanding the act chapter 90 of the Laws of 1860, she could still work for her husband, she could devote all her time and service to him, and the circumstances of this case are such as to warrant the finding of the referee, that the services were rendered by him through her. These views are not in conflict with *Brooks v. Schwerin* (54 N. Y., 343). There a poor woman went out to work by the day, earning wages, and it was held that the wages thus earned in labor outside of her household, and entirely disconnected from her household duties, belonged to her. But if the husband takes boarders into his house, or converts his house into a hospital for the sick, and his wife takes charge of his establishment, and thus aids him in carrying on his business, in the absence of special proof, all her services and earnings belong to her husband. Even under such circumstances, the husband might covenant and agree that his wife should receive pay for her services on her own account; but in the absence of some arrangement to that effect, the inference of law and fact would be that she was working for her husband in the discharge of her marital duties. Hence, the referee properly held that the husband was the proper person to sue in this case.

The evidence tends strongly, if not conclusively, to show that the understanding of all the parties was that the testator was to pay for the services rendered by Mrs. Reynolds by a provision for her in his will. If the referee, upon a new trial, finds that there was such an understanding, then the main question to be determined will be, whether the provision made in the will for Mrs. Reynolds was sufficient to pay for her services. If he should find that it was, the plaintiff must be defeated. If he should find that it was not, then the plaintiff may



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recover the balance, after deducting the legacy of \$1,500 to his wife. It is no objection to this view that the services were rendered by his wife under the circumstances stated. Under all the circumstances, his wife was clothed with authority to contract with the testator, and plaintiff's assent to the mode of compensation must be inferred. The agreement in law, upon the assumption that the referee shall find the facts as above stated, was with the husband that the testator should pay for the services by a provision for his wife in his will. If he had failed wholly to make such a provision, it would have left the plaintiff with his entire cause of action. If he made such a provision in part only, then the husband has a cause of action for the balance. (*Jacobsen v. La Grange*, 3 J. R., 199; *Patterson v. Patterson*, 13 id., 379; *Eaton v. Benton*, 2 Hill, 578; *Robinson v. Raynor*, 28 N. Y., 494.)

The plaintiff was permitted, against the objection of defendants, to show that the stench produced by the cancer affected the health of Mrs. Reynolds. This evidence was competent, not to lay the foundation of any recovery for the loss of health, but to show the serious nature of the disagreeable service which plaintiff's wife rendered. It was competent to show not only that the stench was offensive, but that it was detrimental to health.

The plaintiff was permitted, against the objection of defendants, to prove, by Dr. Martin, how much, in his opinion, it was worth to dress the cancer each time; also, how much, in his opinion, it was worth to take care of and nurse the testator, exclusive as well as inclusive of dressing the cancer; and also, by Dr. Moneypenny, how much, in his opinion, it was worth to nurse the testator and dress his cancer twice a day for a period of six years before his death. These doctors were not asked to give their opinion based upon the evidence of other witnesses. They had been acquainted with the testator, were familiar with the cancer and its offensive nature, and with the disagreeable service required in dressing it and taking care of him, and they knew the value of services required for nursing cancer patients. Under such circumstances, their esti-



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mates of value were competent to be placed before the referee.

The views thus far expressed are deemed proper with a view to the new trial, which must be granted for the error of the referee in overruling the objection to the evidence of Dr. Maynard, to which we now call attention. He testified that he had been a physician and surgeon for twenty-seven years; had treated many cases of cancer; had heard the testimony of Doctors Martin and Moneypenny, and heard their description of the cancer with which the testator was afflicted; that he was acquainted with the value of services in dressing such cases, and that he obtained his knowledge in dressing and nursing such cases; and that he had heard the testimony of plaintiff's wife read. The following question was then put: "What would be the value of the services rendered by her in nursing and dressing the cancer of Mr. Hill during the last six years of his life?" Defendants objected to this evidence on the ground that the witness had no knowledge of the value of such services when rendered; that he knew nothing of the services, except as informed by the evidence read to him; and that he was incompetent, under such circumstances, to testify to the value of the services; that he must state facts, and was not competent to give an opinion. The objection was overruled. Doctors Martin and Moneypenny had described the cancer, and plaintiff's wife in her evidence had also described it, and mentioned the services which she rendered. The witness had never seen Mr. Hill, and knew nothing about his condition and the character of the services rendered, except from the description of other witnesses. Under such circumstances, it is settled upon authority that his opinion, as given by him, was incompetent. (*People v. Lake*, 12 N. Y., 358; *Carpenter v. Blake*, 2 Lans., 206.)

In such a case, it is not the province of the witness to reconcile and draw inferences from the evidence of other witnesses, and to take in such facts as he thinks their evidence has established, or as he can recollect and carry in his mind,

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and thus form and express an opinion. His opinion may be obtained by stating to him a hypothetical case, taking in some or all the facts stated by witnesses, and claimed by counsel putting the question to be established by their evidence, and when the question is thus stated, the witness has in his mind a definite state of facts, and the province of the triers, whether referees or jurors, is not interfered with. They will determine whether the facts exist which are thus assumed, and then give the opinion such weight as they think it entitled to, with a full knowledge of the facts upon which it is based. It cannot be said that the evidence elicited by this question was wholly harmless. The witness answered, three dollars per day for the whole period of six years. Other witnesses for plaintiff placed a higher value upon the services, and witnesses on the part of the defendants, a much lower value. The referee found the value to be two dollars per day. Hence it cannot be said that he was not influenced by the improper evidence.

For this error, the judgment must be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

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MARY E. EARL, Respondent, v. RICHARD PECK, Administrator, etc., Appellant.

Mere inadequacy of consideration, except as a circumstance bearing upon the question of fraud or undue influence, is not a defence to a promissory note.

Defendant's testator, having taken by mistake a fatal dose of aconite, and being aware of his approaching death, executed and delivered to plaintiff—who had been his housekeeper for seven or eight years, and to whom he was indebted for services—a promissory note for the sum of \$10,000, the consideration expressed being "for services rendered." In an action upon the note, *held*, that it was valid, although the amount was greater than the value of the services.

(Argued April 8, 1876; decided April 11, 1876.)

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Statement of case.

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APPEAL from judgment of the General Term of the Supreme Court in the second judicial department affirming a judgment in favor of plaintiff, entered upon a verdict.

This action was brought upon a promissory note made and executed by defendant's testator, George Peck, of which the following is a copy:

"\$10,000. For value received, I promise to pay Mary Earl, for services rendered, ten thousand dollars.

"STANFORD, *October* 12, 1873.

"(Signed)           GEORGE PECK."

The deceased was a physician. Plaintiff had been in his service as his housekeeper from 1867 up to the time of his death, which occurred a few hours after the note was given. No contract had been made as to the rate of compensation for the services, but the deceased had said he would pay her well for them, and the evidence tended to show an understanding that the amount of compensation was to be left to him. Just prior to the execution of the note, the intestate had, by mistake, taken a dose of aconite, which he knew would prove fatal.

The court charged, among other things, that mere inadequacy of consideration was not in itself a defence. To which defendant's counsel duly excepted, and asked the court to charge that it was a defence to the extent the inadequacy was proved. The court refused so to charge, and defendant's counsel duly excepted. The court charged that if the real intent and purpose of the deceased, and the real character of the transaction was, under the form of this note of \$10,000, to go beyond the payment of his actual indebtedness to the plaintiff, and in part to make a provision for, or gift to her, to that extent the note was void, and the plaintiff could not recover therefor.

Defendant's counsel asked the court to charge in connection with this, that if the jury found the fact to be in reference to this note, that it is supported in part by actual indebtedness, that they may render a verdict for the amount of the indebted-

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Opinion of the Court, per CHURCH, Ch. J.

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ness, and not for that intended as a bequest. The court declined, and defendant's counsel duly excepted.

*Henry M. Taylor* for the appellant. The plaintiff was entitled to recover only so much of the note as the value of her services amounted to. (Story on Prom. Notes, § 187; *Tallmage v. Walker*, 25 Wend., 114; *Sawyer v. Chamber*, 44 Barb., 45; *Curtiss v. Leavitt*, 15 N. Y., 96; *Harris v. Clark*, 8 id., 112; *Phelps v. Phelps*, 23 id., 78.)

*Mr. Losey* for the respondent. Inadequacy of consideration was not of itself any defence to this action. (*Johnson v. Titus*, 2 Hill, 606; *Oakley v. Boorman*, 21 Wend., 588; *Sawyer v. McLouth*, 46 Barb., 350; *Scott v. Frink*, 54 N. Y., 635; *Lobdell v. Lobdell*, 36 id., 327; *Worth v. Case*, 42 id., 462.)

CHURCH, Ch. J. The defendant's intestate made the note upon which the action was brought after he had taken by mistake a fatal dose of aconite. He was a physician, and was conscious of his approaching death, which occurred about two hours after the note was made. Some evidence was given as to the state of mind of the deceased, and upon the question of undue influence, but it was rather slight, and was properly submitted to the jury. The same remark is true as to the question of delivery. The only point insisted upon in this court, relates to the consideration. The note is for \$10,000, and expresses the consideration to be for services rendered. The plaintiff had been the housekeeper for the defendant, who was a bachelor, for seven or eight years, and the latter was indebted to her for her services in some amount, and the evidence tended to prove that at some time during the service it was agreed that the amount of compensation should be left to the intestate. Mere inadequacy of consideration, except as a circumstance bearing upon the question of fraud, or undue influence, is not a defence to a note. It is not necessary that the consideration of a note shall be equal in pecuniary value

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to the obligation incurred. If no part of the consideration was wanting at the time, and no part of it subsequently failed, although inadequate in amount, the note is a valid obligation, while a want or failure of consideration, in whole or in part, is a good defence to the whole note, or to the extent of such failure. (*Johnson v. Titus*, 2 Hill, 606; 21 Wend., 558.) This case, in its principal features, is quite analogous to the case of *Worth v. Case* (42 N. Y. 362). There, as here, the note expressed the consideration to be for services rendered, and although the amount was more largely in excess of the pecuniary value of the services than in this case, the action was sustained by this court, and the reasoning in the opinions is applicable to the facts of this case. If the intestate chose to pay for the services rendered a much larger sum than they were worth, he had a right to do so. The note was not a gratuity or gift. There is no standard whereby courts can limit the measure of value in such a case, and an obligation is not wanting even partially in consideration, because the value is less than the obligation. A note for a thousand dollars given for a horse confessedly worth but one hundred, cannot be successfully defended in whole or in part, on the ground of a want or failure of consideration.

It is claimed that the note, in large part at least, was a testamentary bequest, and intended as such, and that for that reason the action was not maintainable to the extent that such was the intent. We have examined the various requests to charge upon this question, and are of opinion that, taking the charge together, it was as favorable to the defendant as he had a right lawfully to ask. The judge charged explicitly, that if the real intent and purpose of the deceased, and the real character of the transaction, was under the form of this note of \$10,000, to go beyond the payment of actual indebtedness to the plaintiff, and in fact to make a provision for, or gift to her, to that extent, the note is void, and the plaintiff could not recover therefor. Afterwards a request was made that if the deceased intended to go beyond his actual indebtedness, that the jury should find for the amount of such indebtedness, and not that

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intended as a bequest. This was declined, and an exception taken. This request is somewhat equivocal. If it is the same as that before charged, then the refusal was not error. In that case it was a refusal to repeat the same charge. If it was intended as a request that the jury should find the amount which they should determine was the actual indebtedness, without the qualification in the first part of the charge in respect to an intended bequest, then it was untenable for the reasons before expressed. The intestate declared in the note, that it was given for services rendered. If that was true the note was valid, although the amount was larger than the services were worth. The court charged, in substance, that if the note was used as a mere subterfuge for a testamentary bequest, the plaintiff could not recover to the extent that it was so intended. This went as far for the defendant as the law would justify, but it is quite different from instructions that the jury might find what the real indebtedness ought to be, and regard the balance as a bequest. The latter proposition in effect would deprive the intestate of the power to determine the value of the services for himself, which, as we have seen, he had a right to do.

The judgment must be affirmed.

All concur.

Judgment affirmed.

|     |      |
|-----|------|
| 64  | 600  |
| 122 | 196  |
| 64  | 600  |
| 148 | 189  |
| 64  | 600  |
| 171 | 1877 |

THE PEOPLE ex rel. JAMES D. MOTT, Respondents, v.  
THE BOARD OF SUPERVISORS OF THE COUNTY OF GREENE,  
Appellant.

An order directing the issuing of a writ of peremptory mandamus to compel the performance of an act required by law is only proper in case of a clear, unquestioned, legal right. It should not be granted where the claim is disputed and its validity controverted.

In such case an alternative writ should issue.

(Argued April 4, 1876; decided April 11, 1876.)

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Statement of case.

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APPEAL from order of the General Term of the Supreme Court in the third judicial department reversing an order of Special Term denying a motion for a writ of peremptory mandamus, and directing the issuing of such writ directed to defendant, commanding its members to assemble and impose a tax upon the taxable property of said county of Greene for the purpose of paying the interest upon certain bonds held by relator, issued by defendant.

The affidavits upon the part of the relator alleged, in substance, that under the provisions of the act of 1869, "to enable the supervisors of the counties of Greene and Ulster to issue bonds of said counties to refund taxes illegally collected" (chapter 215, Laws of 1869), certain bonds were issued by the board of supervisors of Greene county to the Farmers' National Bank of Catskill, two of which were assigned to the relator, who purchased in good faith, for full value, without notice of any objection to their validity or payment; that said board subsequently, by resolution, repudiated the bonds and forbade the county treasurer from paying them or the interest thereon, and that no money has been assessed or caused to be collected for the purpose of paying the interest due, but the board has refused so to do.

The principal affidavit presented on the part of the defendant contained the following allegations:

"That, at the session of the board in November, 1870, a resolution was passed forbidding the payment of the interest due on the bonds set forth in the moving papers, and since that time each year the board of supervisors have regularly repudiated and refused to pay the interest on them.

"These resolutions, thus annually passed, have been prepared under deponent's immediate supervision as a member of the committee to which the subject was referred, and deponent has been, and still is, a member of a committee appointed to take charge of and to attend to all the litigations in which the county may become or be made a party.

"The action of the different boards in relation to the bonds

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which are alleged to have been issued in the moving papers was dictated by and taken upon the following grounds, viz. :

“ 1. That a majority of the members of the board in 1869 did not vote for the resolutions authorizing the bonds.

“ 2. That the passage of the said resolutions was accomplished by fraud, bribery and corruption, and not binding upon the county.

“ 3. That the claims presented to the board were rejected, and the application to issue bonds denied ; this was conclusive upon the board, the banks and the county ; and that the subsequent convening of the board, its organization and action in causing said resolutions to be entered on the minutes of such special meeting were void and of no effect.

“ 4. That the bonds were issued to an amount exceeding by \$10,000 or thereabouts the amount for which in any view of the matter, under the act of the legislature, bonds could be issued ; that in 1872, in September, an action was brought by Clifford B. Rossell, in the United States Circuit Court for the southern district of New York, to recover the interest due on a portion of the bonds issued under the resolutions referred to in the moving papers, and which were of the same issue as the bonds involved in this application, and issued at the same time therewith.

“ That said action is now pending ; an answer has been put in on the part of the county. Deponent refers to the summons and complaint and the answer therein, and makes them a part of the affidavit for the purpose of showing upon what grounds payment of said bonds and interest is contested, and on what grounds the payment of the interest on the bonds for which mandamus is here asked will be contested, and which said answer is true of deponent's knowledge, except as to those matters stated on information and belief, and as to those matters he believe it to be true, and deponent hereby affirms the same.”

In the answer referred to it was alleged, in substance, that in November, 1869, while the said board was in session, the claim of said Farmers' National Bank was presented and



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application made for the issuing of bonds under said act, which was denied and the claim rejected; that after the adjournment of the board a call was issued for a special meeting, when the application was renewed and a series of resolutions procured to be entered on the minutes granting the application, but the defendant denied that it was by a majority vote or by a vote of a majority of the supervisors present; that the entry of the resolution was procured by fraud, and that defendant would show that some of the votes were procured by bribery, fraud and corruption; and alleged that the whole proceeding was a fraud committed for the purpose of illegally and improperly procuring bonds to be issued, and that such proceedings and the bonds issued in accordance therewith were not authorized under said statute, as they direct the issue of bonds for taxes paid in 1865; they include interest; they direct the issuing of bonds to banks having no existence at the time of the alleged wrongful assessment; and that bonds were authorized for an amount exceeding the alleged claim and interest.

*Amasa J. Parker* for the appellant. In a case where there is an adequate remedy at law, a mandamus will not lie. (*People v. Croton Bd.*, 49 Barb., 264; *People v. Suprs. Chenango*, 11 N. Y., 563; *Marsh v. Little Valley*, 4 N. Y. S. C., 116; 1 Hun, 554; 13 Alb. L. J., 164; *Northrop v. Pittsfield*, 2 N. Y. S. C., 111; *People v. Hawkins*, 46 N. Y., 11.) An action would lie against the county. (*Brady v. Suprs.*, 2 Sandf., 460; *Huff v. Knapp*, 1 Seld., 65, 67; 21 How., 123, 182; 12 Abb. [N. S.], 50; 12 N. Y., 52; *People v. Green*, 5 N. Y. S. C., 376.) A peremptory writ of mandamus can be granted only when the facts are unquestioned. (5 Wait's Pr., 575, 576; *Barnet v. College, etc.*, 7 How., 290-293; High's Ex. L. Rem., 552; 2 R. S. [Edm. ed.], 608; *People ex rel. Bk. v. Bd. Appmt.*, 3 Hun, 11; *People ex rel. Bk. v. Green*, id., 208; *People v. Contracting Bd.*, 27 N. Y., 378, 386; *People v. Throop*, 12 Wend., 183, 184; *People v. Suprs. Dutchess*, 1 How., 163; *People v. Suprs. Columbia*,

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10 Wend., 363; *Hull v. Suprs. Oneida*, 19 J. R., 259; *People v. Suprs. Albany*, 12 id., 414; *Bright v. Suprs. Chenango*, 18 id., 242; *Doubleday v. Suprs. Broome*, 2 Cow., 533; *People v. Suprs. Schuyler*, 2 Abb. [N. S.], 78; *Ex parte Rogers*, 7 Cow., 526; *People v. Brennan*, 39 Barb., 522; *People v. Brown*, 55 N. Y., 180.)

*Jacob I. Werner* for the respondents. A peremptory mandamus is the relator's proper remedy. (5 Wait's Pr., 572, 573; *Brady v. Suprs. of N. Y.*, 2 Sandf., 460; 6 Seld., 260; *Boyce v. Suprs. Cayuga*, 20 Barb., 294; *Chase v. County of Saratoga*, 33 id., 603; 39 id., 522; 10 Wend., 363; *People v. Suprs. Schuyler*, 2 Abb. [N. S.], 78; *People v. Brown*, 55 N. Y., 193; *In re Gephard*, 1 J. Cas., 134; Tapping's Mand., "Return," 353.)

MILLER, J. The relator seeks, by writ of mandamus, to compel the payment of the interest upon two bonds purporting to be issued by the board of supervisors of the county of Greene, in pursuance of chapter 215 of the Laws of 1869, which authorizes the board of supervisors of said county, if in their discretion they should see fit to do so, to issue the bonds of said county to any banks therein which had paid taxes, during the years 1863 and 1864, upon any portion of their capital stock invested in securities of the United States, exempt by law from taxation.

The principles which govern the issuing of a writ of mandamus to compel the performance of an act which the law requires, are quite well established, and it is settled that where a remedy of this character is invoked there must be a clear and unquestioned legal right. (*People v. Hawkins*, 46 N. Y., 9; *Northrup v. The Town of Pittsfield*, 2 N. Y. S. C., 111; *People v. Croton Board*, 49 Barb., 264; *People v. Board of Apportionment*, 3 Hun, 11; *People v. Green*, 5 N. Y. S. C., 376.)

The authorities cited and others stated in the cases referred to, uphold the doctrine that where the claim is disputed and

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its validity controverted, then the writ of mandamus cannot be invoked. The demand of the relator in the case at bar falls short of establishing a right to a peremptory mandamus, within the rule laid down, as an abstract proposition. Upon the papers a fair subject for legal controversy is presented, which should not be disposed of summarily, but after a full opportunity has been offered to try and determine the validity of the claim which has been interposed.

The bonds in question are issued under a special act of the legislature of the State, and unless the provisions of that act are faithfully and substantially pursued, it is questionable whether they have any legal validity and effect. They are assailed by the affidavits in opposition to the motion on various grounds; and, among others, it is alleged that the bonds authorized by the act were issued, without sanction of law, for an amount exceeding the sum which the legislature provided for; that they embraced taxes unpaid in the year 1865, and interest upon taxes which the statute does not include, and that the resolutions which sanctioned the bonds were not passed by a majority of the members of the board of supervisors.

These objections are sufficiently stated, so as to controvert many of the material facts upon which the relator relies, and present issues which should be tried in the ordinary course of legal procedure. Grave questions of this character cannot well be disposed of upon affidavits which are at all conflicting and call for a decision upon controverted facts. The statements made by the appellants, in answer to the application, are not to be considered as mere expressions of opinion, but contain allegations which are very properly the subject of legal investigation, and a peremptory mandamus does not furnish the best and most orderly mode of determining questions of this character.

It is quite obvious that this is not a case for a peremptory mandamus; and as the act provides that the bonds shall be of the same force and effect as if issued in pursuance of chapter 15, Session Laws of 1863, and the several acts amendatory thereof, and as the board of supervisors are directed

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to cause a tax to be levied in such cases for the payment of the principal as well as the interest upon bonds thus issued, no valid reason is shown why an alternative mandamus should not issue. This is done sometimes when the facts on which the relator relies are in dispute, or where the parties wish to review the case on appeal, or upon the suggestion of either party. In this way the rights of all the parties can be fully protected and the ends of justice answered. In the observations made it is not intended to express any opinion as to the legality of the bonds in controversy, as that question more properly belongs to another forum.

The order appealed from should be modified so as to direct that an alternative mandamus issue.

All concur.

Ordered accordingly.

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THE PEOPLE ex rel. JAMES M. C. TYTLER, Respondent, v.  
ANDREW H. GREEN et al., as the Board of Revision and  
Correction of Assessment Lists, Appellants.

The provision of the act of 1852, "to make permanent the grade of the streets and avenues of the city of New York" (§ 8, chap. 52, Laws of 1852), requiring an assessment of damages to the owners of lots fronting on a street or avenue in said city, in all cases where the grade thereof shall be changed, has not been repealed by subsequent legislation; it is applicable, irrespective of the authority changing the grade; and therefore such owners are entitled to damages for a change of grade made by the commissioners of the Central park.

(Argued April 4, 1876; decided April 11, 1876.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, affirming an order granting the issuing of a writ of peremptory mandamus, directed to defendants as the board of revision and correction of assessment lists, in the city of New York, commanding them to meet as such board, and to receive and confirm the

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assessment list for regulating and grading One Hundred and Twenty-third street, from Eighth avenue to Mount Morris square, as it shall be received from the board of assessors, without deducting or altering an award for damages made to relator, and directed to the board of assessors of said city, requiring them to meet as a board and, among other things, reduce the assessment upon the lots assessed, by the amount of such award.

It appeared that the relator was the owner of lots fronting on One Hundred and Twenty-third street, upon which was a dwelling; that under the act chapter 52, Laws 1852, a grade was established for said street, and the same was regulated and graded; that the commissioners of the Central park, in 1867, established a new grade for said street, under authority of chapter 564, Laws of 1865, and chapter 367, Laws of 1866, and chapter 697, Laws of 1867, which was regulated and graded in accordance therewith, which new grade damaged relator's premises. That the board of assessors estimated and allowed such damage, and included it in the assessment list, which list was transmitted to the board of revision and correction of assessment lists; which board adopted a resolution directing the return of the list to the board of assessors, with a request that they omit assessments and awards for damage by reason of change of grades; which list was returned accordingly, and the board of assessors were about to alter and amend the same as directed.

*Hugh L. Cole* for the appellants. In the absence of any statute creating the liability, municipal corporations, acting under legislative authority to grade streets, are not answerable to adjoining land owners for consequential damages to their premises. (*Radcliff's Exrs. v. Mayor*, 4 N. Y., 195; *Graves v. Olis*, 2 Hill, 466; *Wilson v. Mayor*, 1 Den., 595; *Benedict v. Goit*, 3 Barb., 459; *In re Furman St.*, 17 Wend., 667; *Callender v. Marsh*, 1 Pick., 418.) The statutes under which the grade was changed do not change this rule. (Laws of 1865, chap. 564; Laws of 1866, chap. 367.)

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*James A. Deering* for the respondents. The relators were entitled to be paid for the damages done to their premises. (*People ex rel Doyle v. Green*, 10 Sup. Ct. R., 775; Laws of 1852, chap. 52, § 3; *People ex rel. Ward v. Bd. Assrs.*, 49 How. Pr., 405; *People ex rel. Lynch v. Green*, S. C. Spec. Term, July, 1875; *McCullough v. Mayor*, 23 Wend., 459; *People v. Suprs.*, 10 Wend., 363; *People v. Suprs.*, 16 J. R., 59; Dillon on Mun. Corp., § 688.)

CHURCH, Ch. J. The objection interposed by the board of revision and correction of assessment lists, etc., to confirming the award in favor of the relator for damages sustained by a change of grade of One Hundred and Twenty-second street, is based upon the fact that the change was not made in conformity to the act chapter 52 of the Laws of 1852. By that act, a change of the grade of a street could only be made by the common council, and they were required to publish notice of the same in a specified number of newspapers, procure the written consent of owners, etc. Section 3 of said act requires the assessors to assess the damages to the owner of any lots fronting on the street in all cases when the grade of any street or avenue \* \* \* shall be changed in whole or in part. By various acts since, the authority to regulate the grade of streets has been conferred upon the Central park commissioners, to be exercised "in such manner as they may deem the public interests may require." (Chap. 564 of the Laws of 1875; chap. 367 of the Laws of 1866.)

These acts did not require notice or consent, and the park commissioners could exercise the power conferred without the preliminary steps required by the act of 1852. This is conceded, but it is urged that, as these acts did not provide for awarding damages, that the common-law rule *damnum absque injuria* applies. The act of 1852 is not repealed by these subsequent acts, except by implication, so far as its provisions are inconsistent with them. The provision for assessing damages is general, and is applicable irrespective of the authority which changes the grade, and is as applicable to a

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change made by the park commissioners as by the common council. The act (chap. 303, Laws of 1859) also confers general authority upon the board of assessors to make estimates and assessments for improvements authorized by law "for which an assessment can be made." An examination of the various statutes shows that the policy of awarding damages to owners of real estate, caused by a change of grade of streets, has been adopted and for many years established by law in the city of New York, and although the statutory provisions respecting public improvements have so complicated the subject as to render it difficult of understanding, it cannot be supposed that there was an intent to allow such damages to owners on one street and withhold them on another; and before such a result is reached, it should be clearly demonstrated that the requirements of law demand it. Not only is this not done, but we think, taking all the acts together, that it is quite manifest that the relator is lawfully entitled to compensation. In *People ex rel. Doyle v. Green* (3 Hun, 755) it was held that owners were entitled to damages for a change of grade of this very street, and the decision was affirmed by this court. It is now claimed that the decision was made under the erroneous impression that One Hundred and Twenty-second street is within the territory described in chapter 697, Laws of 1867, under which it is claimed the assessment was made. However this may be, we entertain no doubt but the decision was right, and that ample authority existed independent of the act of 1867, and if so, it is decisive in this case.

There is another query worthy of suggestion. If the city authorities actually change the grade of a street without complying with all the requisitions of the statute, can the city set up its own neglect, or that of its officers, as a defence to a claim for damages? When a street is raised ten feet in front of a dwelling, rendering egress and ingress impracticable, and the owner demands reparation, can the city say, true, we have injured your property by raising the grade of the street, and the law allows you compensation, but as our agents neglected

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some of the preliminary steps, you are not entitled to any redress? It is not needful to pass upon this question. No such neglect appears in this case.

After an examination of the statutes, in this and other cases, relating to public improvements in the city of New York, it seems not inappropriate to suggest that a genuine reform, producing immense benefits, could be effected by a simplification and codification of all the laws on that subject. The interests of the city and of the citizens would be greatly promoted, and their respective rights better protected, and a very large amount of unnecessary and expensive litigation would be prevented.

The order of the General Term must be affirmed.

All concur.

Order affirmed.

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THE PEOPLE OF THE STATE OF NEW YORK, Appellants, v.  
CORNELIUS M. HORTON et al., Respondents.

Slight inconveniences and occasional interruptions in the use of a highway or navigable stream, which are temporary and reasonable, are not illegal merely because the public may not, for the time, have the full use of the highway or stream.

If a craft of any kind is adapted for use in any employment for which a canal may lawfully be used, and is actually employed in a business lawful in itself, and does not in the conduct of such business unreasonably or unnecessarily obstruct the navigation of the canal by other vessels, a court of equity will not forbid the use of the craft in such employment; and this, although some obstruction to the free passage of vessels necessarily results from the peculiar employment.

It is not the province of a court of equity to proscribe one branch of a business in which a party is engaged, while permitting every other branch of the same business to be carried on in the same locality and with the same instrumentalities.

Defendants were the owners of a floating elevator, which was used by them in the "Buffalo City Ship canal" (an artificial channel, forming part of the harbor of that city), for the purpose of transferring grain in bulk from lake vessels to canal boats, moving from place to place as required. When not in use it was moored opposite lands owned by



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defendants. The channel of the canal is 160 feet wide. When employed in unloading a vessel, with the vessel on one side and a canal boat on the other, the three craft occupy less than eighty feet of the channel, and a transfer of the load of a vessel is made in a few hours. Vessels moving in the canal are moved by steam power. In an action by the attorney-general in behalf of the people, a judgment was rendered restraining such use, but allowing the use of the elevator for unloading vessels aground or for any other purpose. *Held*, error; that the use was not an unnecessary, unreasonable and unlawful use of the canal, or an unreasonable and unlawful obstruction to trade and commerce, but was in aid of commerce.

Defendant offered to prove on the trial that the use of their elevator lowered the price for transferring grain, and induced trade which would otherwise have gone to foreign ports, which evidence was excluded. *Held*, error, as the question was directly presented whether the slight obstruction resulting from the use of the elevator was not more than balanced by the public benefit.

(Argued April 8, 1876; decided April 11, 1876.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department reversing a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term. (Reported below, 5 Hun, 516.)

This action was brought by the attorney-general to restrain defendants from locating, stationing or mooring a floating elevator owned by them in the City Ship canal of Buffalo, and to abate the same as a nuisance.

The court found, in substance, that the City Ship canal mentioned in the complaint is located within the limits of the city of Buffalo, and is an artificial channel of water, constructed for the purpose of increasing the shipping and commercial facilities in the harbor of Buffalo, and is used for the purpose of a harbor and for the passage of vessels that frequent the harbor of Buffalo; that the said canal is about two miles long, 200 feet wide, between thirteen and fourteen feet deep, with sloping banks, leaving the channel of the same nearly 160 feet in width; that the lands abutting on said canal are owned by private individuals, and are used in most instances as places for business connected with the trade and commerce done in the harbor of Buffalo; that the defendants are in the legal and rightful possession of

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a parcel of land lying on the north and river side of said canal and abutting thereon, with about 200 feet frontage thereon; that the same is about 960 feet from the intersection of the canal with Buffalo river, and is in one of the most used and important parts of such canals; that the defendants own in their own right and have possession of, manage, use and control a structure commonly called a floating elevator, and the same is used and kept by the said defendants in the waters of Buffalo harbor; that the same is about ninety-six feet long, twenty-four feet wide, and draws between two and three feet of water, and is capable at all times during the season of navigation of being moved to and from all places in the said harbor; that it possesses no motive power of its own, and when moved from place to place, the same is done by steam tugs or otherwise; that there is placed thereon, and made part thereof, machinery and fixtures suitable for the purpose of transferring cargoes of grain in bulk from one floating vessel to another with safety, cheapness and dispatch; that, during the season of navigation, for a year preceding the trial of this action, the said defendants have for the most of the time had and kept the said structure moored in the said canal at a point opposite the said premises so occupied by them, and when not in use made fast to the wharf on said premises; that the said defendants, during the season of navigation, are, by the means and use of said structure, doing and carrying on the business of transferring cargoes of grain in bulk from propellers and other water crafts to canal boats; that the said structure is capable of transferring from one vessel to another from 4,000 to 6,000 bushels per hour, and during the present season has so transferred at least 1,000,000 of bushels; and there is also contrived and placed in said structure the proper means of weighing grain, and frequently cargoes are so weighed during the process of transfer; that the usual and customary way of carrying on such business is as follows: A vessel from the lake loaded with grain, desiring to transfer her cargo into canal boats by means of the said floating elevator, moves up to the wharf occupied by the

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Statement of case.

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defendants and makes fast, laying side to; then the said structure or elevator is placed in position beside the vessel outside; then the canal boat is stationed on the out or water-side of the elevator and remains stationary until the cargo is transferred; that, in the transfer of the cargo, no buildings, conduits or machinery stationed on the wharf are used; that the amount of grain transferred is so great that during the present season the said structure is in actual use much of the time and at the place and in the manner aforesaid; that the said structure is well adapted to the use of relieving vessels loaded with grain and aground in the harbor of Buffalo, and has capacity to receive on board a portion of a cargo and to be used as a lighter, and is occasionally and as often as called upon by defendants for such purpose in Buffalo harbor at all places where vessels are aground; that the business carried on by the said defendants in said canal by means of said structure in transferring cargoes of grain in bulk from one vessel to another vessel in the mode and manner aforesaid, when the vessel from which the cargo is transferred is not stranded, aground or disabled, is an unnecessary, unreasonable and unlawful use of the said canal and harbor of Buffalo, and is an unnecessary, unreasonable and unlawful obstruction to the trade and commerce carried on in the said canal and in the harbor of Buffalo.

And also found the following conclusion of law: That the use made by the defendants of the floating elevator and the purpose to which they have heretofore and are now applying the same in the said City Ship canal is an unnecessary, unreasonable and unlawful obstruction of the said City Ship canal, and unreasonably and unlawfully hinders and impedes the navigation of said City Ship canal, and devotes it to a use and purpose foreign from those for which it was by law designated and intended; and judgment was directed perpetually enjoining and restraining the defendants from using the said floating elevator in the City Ship canal as a means and in the business of loading and unloading vessels freighted with grain in bulk, when and in instances the vessel being

## Statement of case.

loaded or unloaded is not aground or otherwise disabled, and is capable of being navigated; that the judgment herein is in nowise to prevent or interfere with the use by the defendants of said structure or elevator in lightering or unloading vessels or crafts in the said City Ship canal that are aground or otherwise disabled, nor from using the same for purposes not so expressly enjoined and forbidden.

Judgment was entered accordingly.

*G. A. Scroggs* for the appellants. Defendants, in using their elevator, unlawfully obstructed and encroached upon a public highway for private purposes, and thereby a nuisance was created. (*Hart v. Mayor*, 9 Wend., 571, 584; *Davis v. Mayor*, 14 N. Y., 506; *People v. Cunningham*, 1 Den., 524; *King v. Russell*, 6 East, 427; *Rex v. Jones*, 3 Campb., 230; *Gold v. Carter*, 9 Hump. [Tenn.], 369, 381; *King v. Ward*, 4 Ad. & El., 94; *King v. Cross*, 3 Campb., 224; *D. and H. Canal Co. v. Lawrence*, 2 Hun, 163, 181; 7 Co. Litt., 277 b; Story's Eq. Jur., § 921; 4 Black. Com., 167; Wil. Eq. Jur. [Potter's ed.], 399; 6 Mod., 145; Edm. on Inj., 161; *Attorney-General v. Richards*, Aust. R., 606; *Rex v. Carlile*, 6 C. & P., 636; *King v. Moore*, 3 B. & Adol., 184; *Com. v. Passmore*, 1 S. & R., 219.) The action was properly brought by the attorney-general in the name of the people. (Wil. Eq. Jur. [Potter's ed.], 389, 391, 401; *People v. St. Louis*, 5 Gilm., 351; High on Inj., 526; *Attorney-General v. Hunter*, 1 Dev. Eq., 12.) Courts of equity will grant an injunction to prevent a threatened or attempted obstruction of public navigation. (*People v. Vanderbilt*, 38 Barb., 287; *Attorney-General v. Johnson*, 2 Wils. Ch., 87; *Lane v. Newdigate*, 10 Ves., 192; 2 Story's Eq., §§ 921, 922; *Attorney-General v. Cohoes Co.*, 9 Paige, 133; *Attorney-General v. Utica Ins. Co.*, 2 J. Ch.; *Corning v. Lawrence*, 6 id., 439; *People v. Kerr*, 27 N. Y., 188; Dil. on Munic. Corp., § 529.)

*M. A. Whitney* for the respondents. This action could not be maintained, as an adequate remedy exists under the char-

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Opinion of the Court, per ALLEN, J.

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ter and ordinance of the city of Buffalo, to abate and prevent all obstructions and nuisances in the City Ship canal or harbor. (1 Story Eq. Jur., § 641; *Mayne v. Griswold*, 3 Sandf., 463; 9 N. Y. Leg. Obs., 25; *Crippen v. Hudson*, 13 N. Y., 163; *Voorhies v. Howard*, 43 id., 371; Laws 1870, chap. 519; *Attorney-General v. Brown*, 24 N. J. Eq., 89; *Rowe v. Granite Bridge Co.*, 21 Pick., 347; *M. and E. R. R. Co. v. Prudden*, 5 C. E. Green, 532; High on Inj., § 521; 3 Dan. Ch. Pr., 1740; *Hicker v. N. Y. Bal. Dock Co.*, 24 Barb., 215.) The question whether defendants' elevator was a benefit to commerce was a question of fact. (*D. and Hud. C. Co. v. Lawrence*, L. J. Dec. 19, 1874, p. 394.) Defendants' elevator was not a nuisance. (*Peckham v. Henderson*, 27 Barb., 207; *Griffith v. McCullum*, 46 id., 561; *Howard v. Robbins*, 1 Lans., 63.)

ALLEN, J. There is no question, in this action, of pre-  
sture or an obstruction of the canal as a public highway  
by any permanent structure; neither is there complaint of  
any injury to the banks or walls of the canal, or permanent  
injury to the navigation. The complaint is of the use of the  
defendants' float for a single purpose, and the judgment  
only prohibits its employment for the transfer of grain in  
bulk from one vessel to another. Its presence in the canal,  
and its employment for any other purpose to which it is  
adapted, is not forbidden by the judgment. The evidence  
that the float, at any time, in the least obstructed the naviga-  
tion of the canal is very slight — at the most, causing vessels  
occasionally to slacken their speed when passing the elevator  
when in actual use in the service condemned by the judg-  
ment. In such instances, the speed of a passing vessel has  
been slackened from prudential considerations, but whether  
to avoid a collision, or lest a more rapid rate of speed might  
part the lines by which the vessels were made fast to the  
elevator is doubtful. Had the learned judge found that the  
employment and use of the elevator did not materially hinder  
or obstruct the navigation of the canal, or its use for com-

mercial purposes and as a public highway, the finding would have been fully warranted by the evidence. It is not objected that an action will not lie by the people to restrain and abate a nuisance upon a public highway or prevent injury to public property; and it is not controverted that an obstruction to a highway by which the public are deprived of its use constitutes a nuisance. At the same time, it is not every slight interference with the use of a highway or a navigable stream that will amount to a nuisance, and be indictable as such, or the subject of an action either for its abatement. Slight inconveniences and occasional interruptions are incidental to many lawful uses of public highways and water-courses, and are tolerated by reason of necessity and the benefits resulting to the public at large by the acts causing the interruption. If the obstructions are temporary and reasonable, they will not be declared illegal merely because the public may not for the time have the full use of the highway. There is no law of the State, or ordinance of the city of Buffalo, prescribing the form or size of any vessel or float, or the manner in which it shall be navigated within the harbor or "city canal" in Buffalo, or prescribing the business in which it may be employed, or the means by which it shall be propelled. The judiciary cannot legislate upon the subject. If a craft of any kind is adapted for use in any employment for which the canal may be lawfully used, and is actually employed in a business lawful in itself, and does not in the conduct of such business unreasonably or unnecessarily obstruct the navigation of the canal by other vessels, a court of equity cannot forbid the use of such craft in such employment. That some obstruction and hindrance to the free passage of vessels does necessarily result from the peculiar employment of the craft or vessel will not make such use illegal, or convert such employment, otherwise lawful, into a criminal offence, and subject the owner to an indictment for a nuisance. It must be assumed, from the findings of fact and the judgment of the court, that the presence of the defendants' elevator in the canal is proper; that her use in any part of the canal

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Opinion of the Court, per ALLEN, J.

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and the moving of her from place to place is lawful; and that her employment in any way other than in the transshipping of grain in bulk is lawful. It is not claimed that the transfer of grain from vessel to vessel in the canal is *per se* unlawful. There is no pretence that in such transfer by the defendants, by means of their elevator, there was any unnecessary occupation of space in the canal, or obstruction of the navigation. It is very evident that the use of the elevator is not prejudicial to the public interests or to the commerce of the city of Buffalo or of the State. It is possible that it may interfere with the profits of a few having rival elevators upon land, who, it would seem, not only combined for a higher tariff of charges, for services of the same character as those rendered by means of the floating elevator, than was exacted by the defendants, thus more heavily taxing commerce, but also to instigate and prosecute this action. It would seem that the defendants and their elevator were not in the combination in respect to the tariff, simply because they could not secure satisfactory terms, so that fact does not entitle them to any commendation. Although the craft complained of was not engaged in the carrying of merchandise, or in the towing of vessels so employed, and thus was not, perhaps, employed actually in navigating the canal, she was used as an auxiliary to the commerce of the canal and of the city of Buffalo.

The canal is a part of the harbor of Buffalo, and in it and upon its banks much of the large commerce of that city is carried on. The large quantities of grain brought in lake vessels to that port and destined to an eastern market are necessarily transferred to canal boats and barges, and any instrumentality by which such transfer can be effected with dispatch and at low rates for the service is an aid rather than a hindrance to the commerce of the canal, and justifies any slight obstruction which the act of transfer may cause to the navigation. The almost constant employment of the elevator by vessel owners and consignees is very high evidence that the facilities afforded by it and its owners, by



its means, are promoters of, rather than obstructions to, the commerce of the canal and of the city. The general conclusion of fact that the business carried on by means of the defendants' float, in transferring grain in bulk from one vessel to another, when the vessel from which the cargo is transferred is not stranded, aground or disabled, "is an unnecessary, unreasonable and unlawful use of the said canal and harbor of Buffalo, and is an unnecessary, unreasonable and unlawful obstruction to the trade and commerce carried on in the said canal and in the harbor of Buffalo," which is but an inference of the learned judge from the specific facts proved and found, is not warranted by, but is repugnant to and inconsistent with; such facts. The canal is 200 feet wide, with sloping banks, giving a clear, navigable channel 160 feet in width, and more than thirteen feet depth of water; the elevator of the defendants, with a vessel upon one side and a canal boat upon the other, occupies less than eighty feet in width; thus leaving more than one-half of the navigable channel of the canal for other vessels, and is capable of transferring from one vessel to another from 4,000 to 6,000 bushels of grain per hour; and prior to the 16th of June, 1874, had transferred, during the season of navigation of that year, at least 1,000,000 bushels of grain, from vessels to canal boats, for transportation.

These facts are entirely irreconcilable with the theory that the use of this elevator in that business is an obstruction to the commerce of Buffalo; and the space left by the elevator, when in this service, for the passage of other vessels, is ample in view of the fact that the vessels in that channel are either propelled by steam power of their own or moved by steam tugs; and the dispatch with which it is capable of discharging the cargo of a vessel shows that but a few hours, at most, are required for the transfer of the cargo of any vessel arriving in the harbor; so that the occupation of the space of which complaint is made for any one service or at any one point, is very brief in point of time. The learned judge, upon the trial, discriminated between the use of an elevator



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for the transfer of grain from a vessel when stranded and a like transfer from the same vessel when afloat and free to move; but there is nothing in the emergency of a grounded vessel which will make an act lawful that would be unlawful under other circumstances. Other means could be resorted to to relieve the grounded vessel; and the master of a vessel afloat should have the same right to choose the facilities and instrumentalities for a speedy discharge of his cargo as the master of a stranded vessel has secured to him by the judgment of the court at Special Term. That employment cannot be unnecessary, unreasonable and unlawful which is lawful in itself and conducted in a proper manner and in furtherance of the business and commerce of the locality in which it is carried on. It is not the province of a court of equity, in the absence of any positive law, to proscribe one branch of a general business in which a party is engaged while permitting every other branch of the same business to be carried on in the same locality and with the same instrumentalities. There is no business done upon the canal, whether loading or unloading salt, staves, lumber, iron or other merchandise, or navigating the canal, which may not to some extent, for the time being, interfere with the free use of the canal by other vessels; but this does not make the business unlawful. A vessel and a canal boat lying side by side at the wharf of an elevator stationary upon the land, during the transfer of grain from one to the other, will, to some extent, obstruct the navigation, but that would not justify an action by the attorney-general either to abate the elevator as a nuisance or prohibit its employment in that manner. The right of passage in this canal as a public highway, is subordinate to and controlled by the claims of trade and commerce; and the same considerations which control in the case of navigable streams, must determine the legality of any structure in aid of commerce which is claimed to be an obstruction.

Tested by those rules the use of the defendants' elevator for any purpose as an auxiliary to the commerce and the navigation and use of the canal, could not, upon the evidence

or the findings of the judge in this case, be condemned as unlawful. The employment being lawful the question was directly presented, whether the slight obstructions resulting from the means used were not more than balanced by the public benefits and the facilities rendered to the commerce of the canal and of the city, and it was error to refuse to consider them. (*D. and H. Canal Co. v. Lawrence*, 10 Albany Law Journal, 394.)

There was no permanent appropriation by the defendants of any part of the canal to their own use, they rendering service to the vessels employing them wherever wanted. The cases in which indictments have been sustained for a nuisance in the obstruction of highways, or suits in equity maintained for the removal of obstructions, are those in which there has been a permanent encroachment by an embankment or other structure, or some threatened or actual injury to the public works, or such a permanent and continued occupation of the highway for a purpose foreign to and inconsistent with its use by the public as to amount to a permanent obstruction. (*King v. Ward*, 4 A. & E., 384; *King v. Russell*, 6 East, 427; *People v. Cunningham*, 1 Den., 524; *Attorney-General v. Cohoes Co.*, 6 Paige, 133.) *Hart v. The Mayor, etc., of Albany* (9 Wend., 571), was the case of a bill filed by the complainants to restrain the defendants from enforcing an ordinance which prohibited the continuance and maintenance of a float or ark, which they had constructed and permanently moored in the Albany basin, by means of which they had appropriated permanently, for their own personal profit a portion of the basin, which was constructed as a harbor for floats and vessels navigating the Hudson river or engaged in transshipping produce and merchandise. The injunction was dissolved by the chancellor and the order was sustained, upon appeal, by the Court for the Correction of Errors. Judge SUTHERLAND delivered an opinion for the affirmance of the order, principally upon the ground that the complainants had failed to show a case entitling them to the special interposition and protection of a court of equity,

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Opinion of the Court, per ALLEN, J.

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according to the well-established principles of that court. Senator TRACY concurred in the result of Judge SUTHERLAND's opinion, and on the same ground, saying that the complainants did not show that the injury they might sustain by the destruction of their float would be remediless at law. He added that he did not consider the question whether the float was or was not a common nuisance, to be necessarily involved in the case as to require the solution of it. Senators ALLEN and EDMONDS also delivered opinions for affirmance; the former upon the ground that the common council of the city of Albany had power to enact and execute the ordinances complained of, as a police regulation, to abate a common nuisance. The case is not an authority for holding that the use by the defendants of their elevator for unloading grain in bulk is illegal. To declare so would be a species of legislation; and, under the circumstances of this case, an extension of the jurisdiction of a court of equity unauthorized by any precedent that has come under my observation.

The affirmance of the order of the General Term and a dismissal of the complaint will not prevent an indictment of the defendants for a nuisance, on the trial of which, the facts can be determined by a jury; or, if an indictment will not lie and legislation is necessary to protect either the public or rival elevators, it must be sought from the legislature of the State or the common council of the city of Buffalo.

The order granting a new trial must be affirmed, and judgment absolute for the defendants.

All concur; MILLER, J., not sitting.

Order affirmed, and judgment accordingly.

# MEMORANDA

OF

CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS  
VOLUME AND NOT REPORTED IN FULL.

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JOSEPH A. PESANT, Appellant, *v.* JOHN GARCIA, impleaded,  
etc., Respondent.

(Argued January 17, 1876; decided January 25, 1876.)

*N. C. Moak* for the appellant.

*B. E. Valentine* for the respondent.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

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THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF  
NEW YORK, Respondents, *v.* THE NEW YORK AND STATEN  
ISLAND FERRY COMPANY, et al., Appellants.

THE PEOPLE EX REL. THE MAYOR, ALDERMEN AND COMMON-  
ALTY OF THE CITY OF NEW YORK, Respondents, *v.* WILLIAM  
H. PENDLETON, Appellant.

It is not an excuse for the violation of an injunction that the order is more  
extensive in its restraints than the prayer of the complaint; the order, if  
irregular, is not void, and while it is in force it is the duty of the defend-  
ant to obey it.

Corporations may be restrained by injunction, and may be fined for violat-  
ing the injunction.

Where, upon motion to punish a party for contempt in violating an injunction there is legal evidence sufficient to call for the exercise of the judgment and discretion of the court, its decision is not reviewable here. A party, bound to obey an injunction, may be guilty of a violation thereof as well by aiding, abetting and countenancing others in violating it as by doing it directly; such orders must be honestly and fairly obeyed.

Where proceedings to punish a party for contempt, in violating an injunction, are commenced by an order to show cause, interrogatories need not be filed prior to a final adjudication upon the alleged contempt.

(Argued January 18, 1876; decided January 25, 1876.)

THESE were appeals from orders of the General Term of the Superior Court of the city of New York, affirming orders adjudging defendants in contempt.

This action was brought to restrain defendant, The New York and Staten Island Ferry Company, from running a ferry without a license, and also to restrain it from using certain wharf property belonging to plaintiff and leased by it to defendant, The North Shore Staten Island Ferry Company; a preliminary injunction was granted. The papers in the action, with notice of motions for temporary injunction, were served on William H. Pendleton, who was president of both corporations, defendants. Upon service of these papers, the ferry boat "D. R. Martin" began running from another pier during the day, but using the wharf property at night, and there taking on coal, etc., for running the next day. Upon the motion an order was granted, June 16, 1875, continuing the injunction and enjoining the running of the ferry. On the next day, Pendleton, as president, and in the name and by authority of The New York and Staten Island Ferry Company, executed a bill of sale of the ferry boat to himself, individually, the consideration expressed being one dollar, and continued running the boat the same as before, until June nineteenth, when Pendleton executed a bill of sale, for the expressed consideration of one dollar, to one Birdseye.

Upon affidavits proving these facts, and stating circumstances tending to show that the transfers were merely colorable for the purpose of evading the injunctions, orders were obtained requiring defendants and Pendleton to show cause why they should not be punished for contempt in violating

said injunctions. Defendant The New York and Staten Island Ferry Company was fined for violating both injunction orders. The North Shore and Staten Island Ferry Company was fined for violating the first order; and Pendleton was fined for violating both orders, and ordered to be imprisoned.

Upon appeal to this court, it was urged that the injunction orders were invalid, they being more extensive in their restraints than the prayer of the complaint.

*Held*, that the orders, even if irregular in this respect, were not void (*Richards v. West*, 2 Green Ch., 456; *People v. Sturtevant*, 9 N. Y., 263); and that the point could not be considered upon appeal, as while the orders were in force, defendants and their officers were bound to obey them.

Also, *held*, that the defendant corporations could be restrained and fined for violating the injunctions. (*People v. A. and B. R. R. Co.*, 12 Abb., 171.) That the proof tending to show a willful violation of the injunctions by defendants and Pendleton was sufficient to call for the exercise of the judgment and discretion of the court below, and that this court could not interfere with the decision thereon. The court stating the rule to be that injunction orders must be fairly and honestly obeyed, and not defeated by subterfuges and tricks on the part of those bound to obey them; that they might be violated by aiding, countenancing and abetting others in violation thereof as well as doing it directly; and that courts would not look with indulgence upon schemes, however skillfully devised, designed to thwart its orders.

Also, *held*, that where an order to show cause is obtained, it is not necessary to file interrogatories before a final adjudication as to the alleged contempts.

*Amasa J. Parker* for the appellants.

*Lyman Tremain* for the respondents.

EARL, J., reads for affirmance.

All concur.

Orders affirmed.

WILLIAM B. DUNCAN et al., Respondents, v. MARGARET D.  
KATEN, Appellant.

(Argued January 18, 1876; decided January 25, 1876.)

*Peter Mitchell* for the appellant.

*John W. Weed* for the respondents.

Agree to affirm. No opinion.

All concur.

Order affirmed.

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THOMAS LANGLEY, Respondent, v. THOMAS CORNELL,  
Appellant.

(Argued January 26, 1876; decided February 1, 1876.)

*S. L. Stebbins* for the appellant.

*J. A. Steele* for the respondent.

Agree to affirm. No opinion.

All concur; EARL, J., not sitting.

Judgment affirmed.

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WILLIAM MORTHORST, by Guardian, etc., Respondent, v. THE  
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COM-  
PANY, Appellant.

(Argued January 20, 1876; decided February 1, 1876.)

*A. P. Laning* for the appellant

*John H. Martindale* for the respondent.

Agree to affirm. No opinion.

All concur; ALLEN, J., not sitting

Judgment affirmed.

WILLIAM J. COMINS et al., Appellants, v. THE BOARD OF  
SUPERVISORS OF JEFFERSON COUNTY, Respondent.

(Argued January 20, 1876; decided February 1, 1876.)

REPORTED below, 3 Thompson & Cook, 296.

The complaint in this action alleged that plaintiffs were taxable inhabitants of that part of the city of Watertown which, before the incorporation of the city, formed part of the town of Watertown; that they brought an action in their own behalf and in that and of all the taxable inhabitants of that part of the city, and that certain bonds, issued on behalf of the old town of Watertown, under chapter 75, Laws of 1869, and chapter 152, Laws of 1870, were illegally issued; and they asked judgment that defendants be enjoined from levying any tax upon the taxable property within that part of the city of Watertown, for the purpose of paying the principal or interest of said bonds. *Held*, that the action could not be maintained, and that the complaint was properly dismissed. (*Susquehanna Bank v. The Board of Supervisors of Broome*, 25 N. Y., 312; *Kilbourn v. St. John*, 59 id., 21; *Magee v. Cutler*, 43 Barb., 239; *Ayers v. Lawrence*, 63 id., 454.)

An extra allowance was granted by the Special Term. *Held*, that, as the court did not exceed its jurisdiction, the exercise thereof was not reviewable here.

*Lansing & Sherman* for the appellants.

*George F. Comstock* for the respondent.

*Per Curiam* opinion for affirmance.

All concur.

Judgment affirmed.



THE PEOPLE ex rel. TENTH NATIONAL BANK, Appellant, v.  
THE BOARD OF APPORTIONMENT OF THE CITY AND COUNTY  
OF NEW YORK, Respondent.

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| 64  | 627 |
| 119 | 517 |

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| 64  | 627 |
| 146 | 68  |

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| 64  | 627 |
| 156 | 575 |

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| 64  | 627  |
| 168 | 1899 |

Where, upon the return of an order to show cause why a mandamus should not issue, the relator takes no issue upon the allegations of the affidavits and papers presented by defendant, but proceeds to argument and asks for a peremptory writ; this is equivalent to a demurrer, *i. e.*, it is an admission of the truth of those allegations, as statements of facts, but a denial of their sufficiency in law to prevent the issuing of the writ, and if the papers set forth facts showing the relator not entitled to the relief sought, the writ cannot be granted.

Where a party has a remedy by action, relief by mandamus will be denied.

(Argued January 25, 1876; decided February 1, 1876.)

THIS was an appeal from order of the General Term of the Supreme Court in the first judicial department, reversing an order of Special Term directing the issuing of a writ of peremptory mandamus. (Reported below, 3 Hun, 11.)

The order was as follows :

“That a peremptory mandamus issue, commanding the board of apportionment of the city and county of New York forthwith to meet as such board of apportionment, and by concurrent vote to authorize the issue of stock of the county of New York, to be issued pursuant to the provisions of section 7 of an act entitled ‘An act to make provision for the local government of the city and county of New York,’ passed April 3, 1871, being chapter 583 of the Laws of 1871, and to take such action as will authorize the comptroller to issue such stock to such amount as will enable the comptroller of the city of New York to pay to the said Tenth National Bank of the city of New York the sum of \$242,579.92, with interest thereon from the day of the date of the several advances of the several amounts composing said sum, being the claim and demand of said bank for balance due for advances made by said bank, prior to the 31st of December, 1871, to the commissioners of the new county court-house, the question of the liability of said comptroller to pay, and what amount, not being passed on this motion.”

The affidavits and papers read upon the motion, on the part of defendant, contained statements of facts showing that the relator had no legal claim against the city or county of New York for the amount of the debt sought to be recovered, or for any part thereof.

*Held* as above, and that if the relator had a valid claim, by virtue of chapter 304, section 27, Laws of 1874, he could maintain an action against the city thereon. The court citing, as to first proposition, 4 Wendell, 474.

*H. H. Anderson* for the appellant.

*John H. Strahan* for the respondent.

*Per Curiam* opinion for affirmance.

All concur.

Order affirmed.

THOMAS HAMILTON, Plaintiff in Error, *v.* THE PEOPLE OF  
THE STATE OF NEW YORK, Defendants in Error.

(Argued January 25, 1876 ; decided February 16, 1876.)

*Peter Mitchell* for the plaintiff in error.

*Benjamin K. Phelps* for the defendant in error.

Agree to affirm. No opinion.

All concur, except CHURCH, Ch. J., not voting.

Judgment affirmed.

BYRON MARKS, Respondent, *v.* HIRAM I. KING, Appellant.

Evidence admitted upon a trial by jury, either without an objection or properly under objection, which for any reason should not be considered by the jury, is not necessarily to be stricken out on motion, but may be retained in the discretion of the court; the remedy of the party is to ask for instructions to the jury that they disregard it.

(Argued January 26, 1876; decided February 8, 1876.)

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| 64    | 628 |
| 118   | 387 |
| 64    | 628 |
| 120   | 163 |
| 64b   | 628 |
| j 156 | 391 |
| 64b   | 628 |
| 159   | 65  |
| 64b   | 628 |
| 164   | 469 |

THIS action was against defendant as indorser of a promissory note payable to the order of one Bell. The defence was that the alleged indorsement was a forgery. (Reported below, 1 Hun, 435.)

It appeared that the note was given to take up a former note which was indorsed by defendant. On the trial plaintiff offered in evidence certain drafts given to Bell as the avails of the former discount; these were received under objection and exception. *Held*, that the evidence was competent as part of the *res gestæ*, and also as laying the foundation for other evidence which might connect defendant with the transaction, and as showing that the note which formed the consideration of the alleged indorsement, had a valid inception. One objection was that defendants had not been connected with the drafts. *Held*, that this went to the order of proof simply, which was in the discretion of the court.

Defendant subsequently moved to strike out the drafts and all evidence in regard thereto; this motion was denied. *Held*, that this did not constitute a ground for a legal exception; that the evidence having been properly received, it could be retained at the discretion of the court, and the remedy of the party was to ask the court to instruct the jury to disregard it.

A check purporting to be signed by defendant was offered and received in evidence, under objection. This check, it was claimed by plaintiff, was for the avails of a note made by defendant and discounted by the bank on which the check was drawn, which note, as was also claimed, was paid and taken up by the drafts above mentioned. It was assumed that the check was signed by defendant, but it was objected that the witness who produced it had no knowledge of the note being paid, and no personal knowledge of the note or drafts, and that it was not the best evidence of the discount of the note. *Held*, that the check was some evidence of the discount of the note and was, therefore, properly received; and was a circumstance connecting defendant with the origin of the debt and making of the note, the first in the series of which the note in suit was the last.

The principal witness for plaintiff, as to the genuineness

of the indorsement, was one Dickinson. Defendant offered evidence that Dickinson had been active in procuring the indictment of Bell for forging the indorsement of defendant. This evidence was rejected. *Held*, no error; that the fact offered to be proved was entirely collateral, and its rejection did not lay the foundation of an exception. (*G. W. Tpke. Co. v. Loomis*, 32 N. Y., 127.)

*O. W. Chapman* for the appellant.

*Giles W. Hotchkiss* for the respondent.

ALLEN, J., reads for affirmance.

All concur; MILLER, J., not sitting.

Judgment affirmed.

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SAMUEL RAYNOR et al., Respondents, v. PETER M. HOAG-  
LAND, Appellant.

(Argued January 28, 1876; decided February 8, 1876.)

*Ira Shaffer* for the appellant.

*Duncan Smith* for the respondent.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

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AMELIA KOEHNCKE, Respondent, v. JOSEPH ROSS, Appellant.

(Argued January 28, 1876; decided February 8, 1876.)

*J. F. Harrison* for the appellant.

*E. F. Hall* for the respondent.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

MAROENA M. DICKINSON, Respondent, *v.* CHARLES S. COLLYER,  
Appellant.

(Submitted January 28, 1876 ; decided February 8, 1876.)

*Samuel J. Crooks* for the appellant.

*C. P. Hoffman* for the respondent.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

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LUCAS THOMPSON, Respondent, *v.* ALEXANDER LUMLEY et al.,  
Appellants.

(Argued January 31, 1876 ; decided February 8, 1876.)

*O. Bainbridge Smith* for the appellant.

*A. J. Requier* for the respondent.

Agree to affirm order and judgment absolute against  
defendant on stipulation. No opinion.

All concur.

Order affirmed and judgment accordingly.

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THOMAS C. CLARK, Appellant, *v.* JAMES DONALDSON,  
Respondent.

(Argued January 31, 1876 ; decided February 8, 1876.)

THIS appeal presented questions simply as to the reception  
and rejection of evidence, which were disposed of, principally  
by a consideration of the circumstances of the case.

*Thomas Nolan* for the appellant.

*Francis Tillou* for the respondent.

ANDREWS, J., reads for affirmance.

All concur.

Judgment affirmed.

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LAWRENCE HENNESSEY, Appellant, v. WILLIAM C. COOPER,  
Respondent.

(Argued February 1, 1876 ; decided February 8, 1876.)

*C. C. Egan* for the appellant.

*Sidney V. Lowell* for the respondent.

Agree to dismiss appeal. No opinion.

All concur.

Appeal dismissed.

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RICHARD L. HUNTER et al., Executors, etc., Appellants, v.  
ISAAC D. WETSELL et al., Respondents.

*E. W. Paige* for the appellants.

*Samuel Hand* for the respondents.

Agree to dismiss appeal. No opinion.

All concur.

Appeal dismissed.

JOHN A. GODFREY, Appellant, v. WILLIAM MOSER, Respondent.

(Argued February 1, 1876 ; decided February 8, 1876.)

REPORTED below, 3 Hun, 218.

*A. J. Requier* for the appellant.

*S. W. Fullerton* for the respondent.

Agree to dismiss appeal. No opinion.

All concur.

Appeal dismissed.

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HENRY E. P. SUTTON, Appellant, v. GEORGE T. M. DAVIS,  
Executor, etc., Respondent.

(Argued February 1, 1876; decided February 8, 1876.)

THIS was an appeal from an order of General Term affirming an order of Special Term denying a motion on the part of plaintiff to attach defendant for alleged contempt.

The alleged contempt was in the neglect to obey a decree herein requiring defendant to pay over to plaintiff a certain portion of the estate in his hands, and a certain sum for funeral expenses paid. The motion was denied, for the reason that the amount defendant was to pay over, was not specifically or definitely stated, and for the purpose of ascertaining the amount an accounting was directed. *Held*, that the order, both that portion refusing to punish for the alleged contempt and that directing a reference, was within the discretion of the court, and so not reviewable here; that the latter portion was not a vacation or modification of the decree.

*A. J. Requier* for the appellant.

*Moses Ely* for the respondent.

*Per Curiam* opinion for dismissal of appeal.

All concur.

Appeal dismissed.

THOMAS W. LENTON, by Guardian, etc., Respondent, v. C.  
GODFREY GUNTHER, Appellant.

(Argued February 11, 1876; decided February 15, 1876.)

REPORTED below, 1 Hun, 310.

*Charles Winfield* for the appellant.

*D. P. Barnard* for the respondent.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

---

GEORGE T. PERKINS et al., Respondents, v. ALFRED S. HATCH,  
Appellant.

(Argued February 7, 1876; decided February 15, 1876.)

REPORTED below, 4 Hun, 137.

*S. E. Chittenden* for the appellant.

*J. A. Shoudy* for the respondents.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

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THE PEOPLE ex rel. FREDERICK S. HEISER, Executor, etc.,  
Respondents, v. THOMAS B. ASTEN et al., Assessors,  
etc., Appellants.

(Submitted February 8, 1876; decided February 22, 1876.)



*Wm. C. Whitney* for the appellants.

*H. M. Whitehead* for the respondents.

Agree to affirm on opinion of DANIELS, J., in court below.

All concur.

Order affirmed.

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THE PEOPLE ex rel. WILLIAM MEYER, Appellants, v. THOMAS  
B. ASTEN et al., Assessors, etc., Respondents.

(Submitted February 8, 1876; decided February 22, 1876.)

*James A. Deering* for the appellants.

*Wm. C. Whitney* for the respondents.

Agree to affirm on opinion of DANIELS, J., in court below.

All concur.

Order affirmed.

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HENRY ARMSTRONG, Respondent, v. THE NEW YORK CENTRAL  
AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(Argued February 8, 1876; decided February 15, 1876.)

*A. P. Laning* for the appellant.

*John H. White* for the respondent.

Agree to affirm. No opinion.

All concur; CHURCH, Ch. J., and ALLEN, J., not sitting.

Judgment affirmed.

ROBERT GLENDENNING, Jr., et al., Respondents, v. THOMAS  
CANARY et al., Appellants.

(Argued February 8, 1876; decided February 15, 1876.)

*Samuel Hand* for the appellants.

*William M. Gallaher* for the respondents.

Agree to dismiss appeal. No opinion.

All concur.

Appeal dismissed.

---

ROBERT GLENDENNING, Jr., et al., Respondents, v. THOMAS  
CANARY et al., Appellants.

(Argued February 8, 1876; decided February 15, 1876.)

*Samuel Hand* for the appellants.

*William M. Gallaher* for the respondents.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

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| 64  | 636 |
| 120 | 535 |

MARY L. HAYCROFT, Respondent, v. THE LAKE SHORE AND  
MICHIGAN SOUTHERN RAILWAY COMPANY, Appellant.

(Argued February 8, 1876; decided February 15, 1876.)

THIS was an action to recover damages for injuries sustained by plaintiff in consequence of being struck by an engine of defendant at a street-crossing. (Reported below, 2 Hun, 489.)

Plaintiff, a girl sixteen years old, was passing along a street in the city of Buffalo, going south, across defendant's tracks (five in number). She had crossed two of these tracks. She looked both ways, and saw a train approaching from the east, on the fifth track. She stopped for this train to pass, standing between the second and third tracks, within about a foot of the third. She had been standing thus a short time, and, about as the train she was watching passed, she was struck and injured by the tender of a locomotive backing up from the west, on the third track, which gave no warning, by ringing a bell or sounding a whistle, of its approach. The plaintiff was nonsuited at the Circuit, on the ground of contributory negligence. *Held*, error; that the question was one of fact for the jury.

*A. P. Laning* for the appellant.

*C. D. Murray* for the respondent.

MILLER, J., reads for affirmance of order and for judgment absolute against defendant on stipulation.

All concur; ANDREWS, J., not sitting.

Order affirmed and judgment accordingly

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LUORUS N. BISHOP, Appellant, *v.* FRANCIS BARTON, Respondent.

(Submitted February 8, 1876; decided February 23, 1876.)

REPORTED below, 2 Hun, 436.

*William H. Henderson* for the appellant.

*James G. Johnson* for the respondent.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

ALBERT A. KENDALL et al., Appellants, v. ROWLAND BRILL,  
Respondent.

(Argued February 10, 1876 ; decided February 22, 1876.)

REPORTED below, 4 Hun, 664.

*H. E. Sickels* for the appellants.

*O. D. M. Baker* for the respondent.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

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JOHN McDONNELL et al., Respondents, v. WALTER BAUEN-  
DAHL et al., Appellants.

(Argued February 14, 1876 ; decided February 22, 1876.)

*C. H. Smith* for the appellants.

*F. Fish* for the respondents.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

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DELOS WENTWORTH, Respondent, v. AVORIA WENTWORTH,  
Appellant.

(Argued February 15, 1876 ; decided February 22, 1876.)

*S. S. Morgan* for the appellant.

*Amos H. Prescott* for the respondent.

Agree to dismiss appeal. No opinion.

All concur.

Appeal dismissed.

SOPHIA O. HULL, Appellant, v. MACGREGOR J. MITCHESON,  
Respondent.

(Argued February 10, 1876 ; decided February 25, 1876.)

THE complaint in this action alleged, in substance, and the referee found, that plaintiff having become entitled to certain real estate in Pennsylvania, in which State she then resided with her husband, executed with him a deed in trust of said real estate, the trustee to rent the real estate and receive the rents and income, and pay over the same to plaintiff or to such persons as she might appoint to receive the same ; or, at her option, to permit her to lease or occupy and enjoy the granted premises, and to receive the rents and income during her natural life, for her separate use and support, and after her decease to hold the same for the use and benefit of such person or persons as she, by will, should nominate and appoint ; and in case of no such appointment, for the use and benefit of her heirs and legal representatives, entitled under the law of Pennsylvania regulating descents, in case plaintiff had died seized thereof, with power to the trustee to sell and dispose of the granted premises, with plaintiff's consent, and to invest the proceeds subject to the like uses and trusts. That defendant was subsequently duly appointed trustee under said trust in place of the original trustee. That plaintiff and her husband having moved to New York, defendant invested the proceeds of the real estate, which had been sold and converted into money, in the purchase of a house and lot in the city of New York. That plaintiff, upon such purchase, entered into possession of the premises, and subsequently they were leased, plaintiff receiving the rents therefrom. The complaint alleged that defendant, for the purpose of annoying plaintiff, and to disturb her use and enjoyment of the premises, had prevented payment of rent by the tenants, and had commenced an action to recover possession of the premises, and was unfitted to discharge the duties of the trust, and asked that defendant might be removed as trustee, etc.

The referee found that the deed in trust was a valid con

tract under the laws of Pennsylvania. That, at the time of the purchase of the premises in this State, defendant supposed that the title to the premises might lawfully be held by him as trustee, and that the trusts might lawfully be executed under the laws of this State. That defendant had commenced the action stated in the complaint, but had, in all respects, faithfully performed his duty as trustee, and had taken no steps for the purpose of annoying her, etc. As conclusion of law, he found, in accordance with a prayer for affirmative relief in the defendant's answer, that defendant was entitled to have the real estate sold and to have the proceeds paid to him, subject to the trust, and directed sale accordingly.

*Held*, that, upon the findings, plaintiff was not entitled to judgment, nor was the defendant entitled to the affirmative relief granted; that the law of Pennsylvania could be learned only as a fact from evidence. That there was no finding or evidence that the provision in the post-nuptial contract or trust deed requiring the grantee, at the option of plaintiff, to permit her to let, devise and occupy, etc., made a legal active trust in the grantee under the laws of Pennsylvania.

*George F. Comstock* for the appellant.

*W. W. McFarland* for the respondent.

*Per Curiam* opinion for reversal and new trial.

All concur.

Judgment reversed.

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CHARLES H. OSBORN, Respondent, *v.* THOMAS KEECH,  
Appellant.

(Submitted February 15, 1876; decided February 25, 1876.)

REPORTED below, 3 Hun, 223.

*Daniel F. Robertson* for the appellant.

*Oscar Smedburgh* for the respondent.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

JOHN A. MOODY, Respondent, *v.* ROBERT T. ANDREWS et  
al., Appellants.

(Argued February 17, 1876; decided February 25, 1876.)

*Samuel Hand* for the appellants.

*James W. Monk* for the respondent.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

---

JOHN S. PROUTY, Respondent, *v.* THE LAKE SHORE AND  
MICHIGAN SOUTHERN RAILWAY COMPANY, impleaded, etc.,  
Appellant.

(Argued February 22, 1876; decided February 25, 1876.)

*James Matthews* for the appellant.

*Lucien Birdseye* for the respondent.

Agree to dismiss appeal. No opinion.

All concur; ANDREWS, J., not sitting.

Appeal dismissed.

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SAMUEL H. MILLER, Appellant, *v.* JAMES BROWN,  
Respondent.

(Submitted February 22, 1876; decided February 25, 1876.)

*George Miller* for the appellant.

*Strong & Spear* for the respondent.

Agree to dismiss appeal. No opinion.

All concur, except MILLER, J., taking no part.

Appeal dismissed.

THE GERMANIA BANK OF THE CITY OF NEW YORK, Respondent, *v.* GEORGE DISTLER, impleaded, etc., Appellant.

(Argued February 22, 1876; decided February 25, 1876.)

REPORTED below, 4 Hun, 633.

*J. J. Perry* for the appellants.

*Geo. W. Carpenter* for the respondent.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

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JOHN A. ENGH, Respondent, *v.* HENRY GREENEBAUM et al., Appellants.

(Argued February 23, 1876; decided February 25, 1876.)

*H. Morrison* for the appellants.

*Robert Johnstone* for the respondent.

Agree to affirm. No opinion.

All concur, except EARL, J., not voting.

Judgment affirmed.

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MORTIMER A. HELMS, Appellant, *v.* JOHNSON V. GOODWILL, Respondent.

(Argued February 8, 1876; decided March 21, 1876.)

THE court, in this action, found, in substance, that in 1868 Albert Helms, plaintiff's assignor, was in possession of certain premises in Randolph, N. Y., under a contract of purchase from Benjamin Chamberlain; that the executors of Chamberlain brought an action against Helms to foreclose the contract, and he retained the defendant, an attorney, to defend the



action; that it was finally agreed, by parol, between Helms and defendant that Helms should assign his contract to defendant, he to procure the money to pay the balance due on the contract and take a deed, giving a mortgage on the lands to secure the payment of the money so procured, and should hold the land, subject to the mortgage in trust, for Helms; that defendant should lay out the lands into village lots, and should assist Helms to sell sufficient thereof to pay off the mortgage, and to convey the remainder, after the mortgage was paid, to Helms, defendant to have and retain one and one-half acres of said lands for his services, and in consideration of an indorsement of \$100 upon a note taken by defendant and partner for services in the foreclosure suit, also in consideration of his building a house of specified quality upon the portion so to be retained; that, in pursuance of the agreement, the assignment was made, the money procured, the executors paid, a deed given to defendant, and a mortgage given by him upon the lands, excepting the one and one-half acres, to secure the money borrowed to make the payment, with \$200 in addition, which \$200 defendant retained, applying \$150 upon said note; that defendant went into possession of the one and one-half acres and built thereon, as agreed; that he did not lay out the residue into lots, and did not sell or assist to sell the same, and did not pay any thing on the mortgage, which was foreclosed and the premises covered by it sold, resulting in a deficiency of twenty-eight dollars and seventeen cents, which defendant was liable to pay; that, on such foreclosure, defendant purchased a part of the lands sold. Helms, however, had previously sold to the mortgagee a lot for \$600, and received payment. As conclusions of law the referee held that defendant was liable to pay the \$200, with interest, less the twenty-eight dollars and seventeen cents, the same to be charged as a specific lien upon the parcel purchased by defendant; that defendant was also liable to pay the value of the one and one-half acres at the time defendant took possession, less the \$100 indorsed upon the note, the same to be a specific lien on said lot. The judgment was reversed by the General Term, on questions of law — not of fact. *Held*, that, although the agreement between

Helm and defendant being oral, could not be enforced as a formal, valid, express trust (*Dillaye v. Greenough*, 45 N. Y., 438), yet as it did not appear, and was not found that Helms knew that the deed was an absolute one to defendant, with no expression or declaration of the trust, there was a resulting trust created in favor of Helms (*Lounsbury v. Purdy*, 18 N. Y., 515), and there remained an interest in Helms; and after possibility of performance had gone by, defendant was bound to account for the estate and for any loss by misfeasance or neglect (*Quinn v. Van Pelt*, 56 N. Y., 417, distinguished); that the action was maintainable as a demand for an accounting in equity, although no damage from neglect was proved; that no fraud was necessary to be shown, or demand to rescind the contract; that the assignment from Helms to plaintiff, being of all demands, causes of action, legal or equitable, etc., passed to plaintiff this right of action for an accounting; that defendant, having received compensation in full at the outset for all he had done and agreed to do, all the benefits which had or might have resulted from the performance of the agreement by defendant in whole, or in part, belonged to Helms, without diminution or abatement; that Helms was entitled to the \$600 for the lot sold by him, to the use and occupation of the premises until sold, to the \$200 received by defendant on the mortgage, and to the \$100 allowed on the note; and that, as it appeared that defendant might, by reasonable exertions, have sold the lands for sufficient to have paid off the mortgage, leaving a surplus equal in amount to the value of the one and a-half acres, the conclusion of the Special Term allowing plaintiff this item was fully sustained; also, that the allowance of costs to defendant was within the discretion of the Special Term.

*W. H. Henderson* for the appellant.

*Frank W. Stevens* for the respondent.

FOLGER, J., reads for reversal of order of General Term, and for affirmance of judgment of Special Term.

All concur, except CHURCH, Ch. J.; RAPALLO and ANDREWS, JJ., not voting.

Order reversed, and judgment accordingly.

GEORGE E. MORSE, Administrator, etc., Appellant, v. DAVID Z. BROCKETT et al., Administrators, Respondents.

THE SAME, Appellant v. THE SAME, Respondents.

DAVID Z. BROCKETT et al., Administrators, etc., Respondents, v. GEORGE E. MORSE, Administrator, etc., Appellant.

(Argued February 9, 1876; decided March 21, 1876.)

*Scott Lord* for the appellant.

*Charles Mason* for the respondent.

Agree to affirm. No opinion.

All concur, MILLER, J., not sitting.

Judgment affirmed.

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PETER S. MARCH et al., Respondents, v. THE FIRST NATIONAL BANK OF MOBILE, Appellant.

(Argued February 14, 1876; decided March 21, 1876.)

*Wm. H. Scott* for the appellant.

*S. P. Nash* for the respondents.

Agree to affirm. No prevailing opinion.

All concur, except CHURCH, Ch. J., and MILLER, J., not voting, and ALLEN, J., dissenting. ALLEN, J., wrote dissenting opinion.

Judgment affirmed.

MARTIN COLE, Respondent, v. MATTHEW VAN KEUREN,  
Appellant.

(Argued February 17, 1876; decided March 21, 1876.)

*S. L. Stebbins* for the appellant.

*William Lounsbery* for the respondent.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

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CHRISTIAN G. VOLTZ, Respondent, v. ABEL I. BLACKMAR,  
Appellant.

(Argued February 24, 1876; decided March 21, 1876.)

THIS action was brought for the alleged conversion of a certificate of deposit.

Defendant, who was a dealer in malt, resided in the city of Buffalo; he had an office in the city of New York, of which, and of his business in that city, plaintiff had charge, he having a power of attorney authorizing him to draw checks, etc. Plaintiff's employment by its terms, expired September 1st, 1872. Before that time defendant advised him that he probably would not require his services for another year, but requested him to remain until September fifteenth, to close up the business. On the fifth of September plaintiff drew a check for \$4,000 in the name of defendant, which he presented at the bank where defendant's account was kept, receiving therefor a certificate of deposit in his own name; at that time defendant was indebted to plaintiff in about \$3,800. Defendant having been advised of this went to New York on the sixth of September, demanded the money

of plaintiff which he refused to deliver up. Defendant then discharged him from his service. Plaintiff, without defendant's knowledge, took from the safe in the office, an envelope containing the certificate, some warehouse receipts belonging to defendant and other papers, and took them away. Defendant on being informed of this fact, sent for a police officer, and on plaintiff's return he was arrested; the papers were taken from him and the certificate was taken by defendant. The court below held that the certificate was the property of the plaintiff, and gave judgment for the amount thereof and interest. *Held*, error; that the money was drawn by plaintiff from the bank without authority and wrongfully, and the certificate therefore represented money which belonged to the defendant, and to which he was entitled; that while the taking of the certificate by violence from plaintiff's possession might give an action for assault, that act did not vest in plaintiff any right as against defendant to maintain this action or to recover in any form of action the money specified in the certificate.

For \$3,000 of defendant's indebtedness to plaintiff, the latter held the promissory note of the former; this was also in the envelope with the certificate. Plaintiff at the time of his arrest in defendant's office, in the presence of the officers, took the note from the envelope, indorsed it as paid and passed it over the desk to defendant, who said he did not want it and laid it on the desk. Plaintiff requested him to pass it back; this he did not do, but left it lying on the desk. He did not refuse to allow plaintiff to take it, nor did he claim any right to retain it. He had, just previously, denounced plaintiff's act in drawing the money as without authority, and demanded its return. The note remained on the desk for several days and was then placed in the safe by defendant's clerk, who produced it on the trial. *Held*, that no inference could be drawn from the transaction that defendant intended to ratify the drawing of the check, or that he accepted and retained the note as a paid instrument, or in any way intended to sanction the appropriation of the \$4,000; nor could it be regarded as a consent that defendant might retain sufficient of the money to pay the note.

*Wm. H. Gurney and John T. Hoffman* for the appellant.

*Asher P. Nichols* for the respondent.

ANDREWS, J., reads for reversal and new trial.  
All concur, except CHURCH, Ch. J., not voting.  
Judgment reversed.

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WILLIAM WILSON, Respondent, *v.* THOMAS DORAN et al.,  
Appellants.

(Argued February 24, 1876; decided March 21, 1876.)

THIS was an action to foreclose a mechanic's lien in Kings county, under chapter 478, Laws of 1862. Decided on authority of *Rollin v. Cross* (45 N. Y., 767) and *Hackett v. Badeau* (63 id., 476).

*Justus Palmer* for the appellants.

*Theo. F. Jackson* for the respondent.

*Per Curiam* memorandum for affirmance.

All concur.

Order affirmed, and judgment absolute against appellants.

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| 64  | 648 |
| 115 | 287 |

ANSON M. BAKER, Appellant, *v.* THE HOME LIFE INSURANCE  
COMPANY, Respondent.

(Argued February 25, 1876; decided March 21, 1876.)

THIS was an action upon a policy of life insurance. The defence was breach of warranty. By the terms of the policy, the statements in the application were made warranties; among other questions was the following: "Have the parents, aunts,

brothers or sisters of the party insured, been afflicted with insanity, consumption, or with any pulmonary, scrofulous or other constitutional disease?" Answer. "No." In answer to another question as to what disease a deceased brother died of, the answer was, "unknown." Plaintiff proved on the trial that the answers were taken down by the agent of the company, who filled out the application; that the insured stated to the agent that she understood that said brother died of consumption, and that the agent stated that where she had no knowledge, to answer "No, none." The evidence established that the mother, one or more of the brothers and one or more of the sisters of the insured, had been afflicted with consumption, and with pulmonary and scrofulous diseases, and had died from their effects. The court nonsuited the plaintiff. *Held*, no error; that the facts established, whether known to the applicant or not, at the time of the application, avoided the policy; that, if the brother named had been the only one of the family who had been thus afflicted, there might have been a question for the jury, whether the fact was not communicated to defendant's agent, in the answer to the subsequent question, in a way to qualify the direct negative; but that the explanation as to his death, did not cover the vice of the warranty as to the other relatives named.

The court reiterated the rule, that the policy having been issued upon the condition that if the statements should be found untrue the policy would be void, the untruthfulness of such statements avoided the policy, and it was immaterial whether they were made in ignorance or fraudulently. (*First Nat. Bank v. Ins. Co. of N. Am.*, 50 N. Y., 45.) Also, that if true answers were given to the agent who filled out the application, and he, for any reason, modified or varied them so as to give them a different meaning, the defendant would be estopped, by the acts of its agent, from challenging the correctness of the answers as modified by him, the answers in such case, although nominally proceeding from the insured being regarded as the act of the insurer. That agents, in the matter of the application and all they do before the policy is issued, are the accredited agents acting within the apparent scope of their authority, and their acts bind the insurer.

(*Ins. Co. v. Wilkinson*, 13 Wal., 222; *Ins. Co. v. Mahone*, 21 id., 152; *Rowley v. Empire Ins. Co.*, 36 N. Y., 550.)

*A. M. Bingham* for the appellant.

*A. B. Capwell* for the respondent.

ALLEN, J., reads for affirmance.

All concur.

Judgment affirmed.

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GEORGE H. CUMMINS, Plaintiff in Error, *v.* THE PEOPLE OF  
THE STATE OF NEW YORK, Defendants in Error.

(Submitted March 20, 1876; decided March 28, 1876.)

*William F. Howe* for the plaintiff in error.

*Benjamin K. Phelps* for the defendants in error.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

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WILLIAM TUTE, Plaintiff in Error, *v.* THE PEOPLE OF THE  
STATE OF NEW YORK, Defendants in Error.

(Submitted March 20, 1876; decided March 28, 1876.)

*William F. Howe* for the plaintiff in error.

*Benjamin K. Phelps* for the defendants in error.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.



MARTIN W. BRETT et al., Respondents, v. THE FIRST  
UNIVERSALIST SOCIETY OF BROOKLYN, Appellant.

(Argued February 23, 1876; decided March 28, 1876.)

DECIDED upon the facts in the case.

*Jesse C. Smith* for the appellant.

*Amasa J. Parker* for the respondents.

*Per Curiam* opinion for affirmance.

All concur.

Judgment affirmed.

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CHARLES G. ROOSEVELT et al., Respondents, v. JAMES A.  
ROOSEVELT et al., Appellants.

(Argued March 20, 1876; decided March 28, 1876.)

REPORTED below, 6 Hun, 31.

Affirmed substantially upon the opinion below.

*George G. Dewitt* and *Charles A. Peabody* for the  
appellants.

*Edward T. Bartlett* and *George H. Yeoman* for the  
respondents.

*Per Curiam* opinion for affirmance.

All concur.

Judgment affirmed.

BENJAMIN HILL, Administrator, etc., Respondent, *v.* THE  
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD  
COMPANY, Appellant.

(Argued March 22, 1876; decided April 14, 1876.)

*E. Harris* for the appellant.

*J. H. Martindale* for the respondent.

Agree to affirm. No opinion.

All concur, except ALLEN, J., not voting.

Judgment affirmed.

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ELLEN COCHLIN, Administratrix, etc., Appellant, *v.* THE  
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD  
COMPANY, Respondent.

(Argued March 22, 1876; decided April 4, 1876.)

*John C. Strong* for the appellant.

*A. P. Laning* for the respondent.

Agree to affirm. No opinion.

All concur, except ALLEN, J., not voting.

Judgment affirmed.

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PRISCILLA ROULSTON, Respondent, *v.* ROXEY E. ROULSTON  
et al., Appellants.

THIS action was brought to have the purchases of certain undivided interests in real estate, which were conveyed, by deed, to David W. Roulston, adjudged to be in trust for plaintiff. David Roulston died intestate in May, 1863, leaving the plaintiff, his widow and six children him surviv-

ing. He owned, at the time of his decease, a large dairy farm, and the stock and farming utensils thereon. Of the children, two were minors, and lived at home. Plaintiff and one of the sons, said David W. Roulston, were appointed administrators. Plaintiff, with the consent of the adults, took possession of and managed the farm, and with it all the personal property. The two minors lived with and were supported by her. David W., as administrator, advertised and sold the personal property, at public auction, to a person who bid it off for, and subsequently transferred it to, said David W., who also purchased the interests of the other adult heirs therein. He left it on the farm in the possession of his mother. The proceeds of the farm were delivered to David W., who, with a portion thereof, and under an arrangement with his mother that he should therewith buy out the adult heirs for the benefit of his mother, purchased from the three other adult heirs their interests, but, instead of taking the deeds in the name of his mother, he, without her knowledge, took title in his own name. The amount of money in his hands, arising from sale of the farm products, was \$4,149.78. The purchase-price of the interests so conveyed was \$2,400. This was not discovered until after his death. His children and widow are defendants. The defence was that the funds used in the purchase were trust moneys in the hands of plaintiff and David W. Roulston, as administrators; that such use of the money was a violation of the trust, and that equity would not interpose to compel the performance of a corrupt bargain, as between the two trustees. *Held*, untenable, that plaintiff did not take possession of the land as administratrix, but, in her own right, with the consent of the adults; and as guardian in socage of the minors, she had the right to possess and manage their real estate, subject to a liability to account to them for the proceeds: that, by virtue of her right of dower, she was entitled to one-third of the proceeds; and, by virtue of the purchases, she became entitled to one-third more. That so far as David W. was concerned, he could not dispute her right to the proceeds, as he had received it as her money, and had agreed to use it in the purchase; also that she was

not a trustee for the value of the use of the personal property, and David W. or defendants could not object that the proceeds thereof were not hers, he having assented to the use; that the sale and purchase by him was valid as to all except the minors, and as to them not void, but voidable. (*Boerum v. Schenck*, 41 N. Y., 182; *Roderick v. Atkins*, 3 id., 93; *Alcott v. T. R. R. Co.*, 27 id., 546; *Forbes v. Halsey*, 26 id., 53), and it did not appear they had repudiated it. But that, in any view of the case, it did not appear that the money used in the purchase was more than plaintiff was entitled to out of the proceeds of the use of the property, real and personal. That, therefore, there was a resulting trust, under the statute of uses and trusts (1 R. S., 728, §§ 51, 53) in plaintiff's favor, enforceable in equity. (*Lounsberry v. Purdy*, 18 N. Y., 515; *Foot v. Bryant*, 47 id., 544.)

Evidence, on the part of the plaintiffs, was received, under objection and exception, that the grantors in the deeds did not read or hear them read and did not know that David W. was grantee therein; also that plaintiff negotiated the purchase. *Held*, no error; as it tended to show that the purchases were intended for plaintiff's benefit, and that David W. took the deeds in his own name, in violation of his duty. Also, *held*, that it was proper to show, as part of the *res gestæ*, statements of the grantors during the negotiations for the purchase, that they would not sell for so low a price to any one but their mother.

*Edward C. James* for the appellants.

*Leslie W. Russell* for the respondent.

EARL, J., reads for affirmance.

All concur.

Judgment affirmed.

AMI DE WITT MITCHELL, Administrator, etc., Appellant, v.  
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD  
COMPANY, Respondent.

(Argued March 24, 1876 ; decided April 4, 1876.)

THIS action was brought to recover damages for the alleged negligent killing of plaintiff's intestate.

The deceased was walking northerly on the east sidewalk of Broadway, the main street of the village of Greenbush ; the defendant's road passed northerly at some distance east of the street. When plaintiff came to a certain street, crossing Broadway, she found some box cars standing there upon a railroad track, partly crossing the street, and obstructing her view of the railroad tracks toward the north and east ; about this time an engine, with five box cars, was coming from the south upon the westerly one of the main tracks of the defendant's road. About 300 feet south-easterly of Broadway there was a switch, and there that train made a running switch — the engine passing on and the cars running off upon another track. As deceased passed the box cars, which were standing still, partly across the street, she emerged into a clear space of six feet before she came to another track. She passed over that track into a space of twenty feet, between the second and third tracks, and as she stepped upon the third track she was struck by the engine and killed. The cars switched off, passed northwestly on the second track, after the deceased had passed that track, and, probably after she was struck by the engine. The engine, in order that the running switch could be made, moved at a greater rate of speed than the cars detached from it. There was nothing to obstruct her view of the second and third track after she passed the first ; there appeared to have been nothing to distract her attention. As she stepped upon the third track she was struck by the engine and killed. Plaintiff was nonsuited on the trial.

*Held*, no error ; that it was clear from the circumstances that if the deceased had used her senses of sight and hearing she must have seen the engine in time to have avoided the

collision, and that but for her carelessness no accident would have happened.

The court cite *Johnson v. Hudson River Railroad Company* (20 N. Y., 65) ; *Reynolds v. New York Central and Hudson River Railroad Company* (58 id., 248) ; *Davis v. New York Central and Hudson River Railroad Company* (47 id., 400) ; *Wilcox v. Rome, Watertown and Ogdensburgh Railroad Company* (39 id., 358).

*Amasa J. Parker* for the appellant.

*Ezek Cowen* for the respondent.

EARL, J., reads for affirmance.

All concur, except ALLEN, J., not voting.

Judgment affirmed.

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THE PEOPLE ex rel. JAMES McKOWN, Respondents, v.  
ANDREW H. GREEN, Comptroller, etc., Appellant.

(Argued March 28, 1876 ; decided April 4, 1876.)

*T. B. Clarkson* for the appellant

*James A. Deering* for the respondents.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

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THE PEOPLE ex rel. THE FEMALE ACADEMY OF THE SACRED  
HEART, Respondents, v. THE COMMISSIONERS OF TAXES AND  
ASSESSMENTS FOR THE CITY AND COUNTY OF NEW YORK,  
Appellants.

(Argued March 28, 1876 ; decided April 4, 1876.)

REPORTED below, 6 Hun, 109.

*Hugh L. Cole* for the appellants.

*Charles E. Miller* for the respondents.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

SOLOMON SIMSON, Executor, etc., Respondent, *v.* LUOINA C.  
SATTERLEE et al., Appellants.

THE SAME, Respondent, *v.* ADRA E. SIMONSON, Appellant.

Where the owner of a mortgage has pledged the same as collateral security for a debt less than the face of the mortgage, he has an interest in the same which entitles him to bring an action for the foreclosure of the mortgage. In such action the pledgee is a necessary party, but it is immaterial whether, as far as the mortgagor or other parties in interest are concerned, he is made a plaintiff or defendant.

It is within the discretion of the court of original jurisdiction whether, upon overruling a demurrer by defendant, he shall be allowed to answer over.

(Argued March 29, 1876 ; decided April 4, 1876.)

THIS was an action to foreclose a mortgage executed by the defendants Satterlee to plaintiffs' testator. (Reported below, 6 Hun, 305.) The mortgage was assigned by said testator to defendant Martling to secure the payment of \$1,000; the mortgage itself was for \$4,000. The complaint set forth the assignment, alleged that the debt to secure which the mortgage was pledged has not been paid, and prayed that out of the proceeds of the sale the amount due thereon should first be paid. The defendants Satterlee demurred to the complaint on the grounds: First. Want of capacity in plaintiff to sue. Second. That defendant Martling should have been made plaintiff instead of defendant. Third. Want of facts sufficient to constitute a cause of action.

The demurrer was overruled, and judgment absolute, as upon default, ordered against said defendants. *Held*, no error. The court stating the rule as above, and citing *Whitney v. McKinney* (7 J. Ch., 144); *Johnson v. Hart* (3 J. Cas., 322); *Norton v. Warner* (3 Edw. Ch., 106).

The other appeal presented simply questions of fact, as to which it was held that there was evidence sufficient to sustain the ruling below.

*A. Prentice* for the appellants Satterlee.

*George W. Stevens* for the appellant Simonson.

*S. F. Rawson* for the respondent.

*Per Curiam* opinion for affirmance.

All concur.

Judgment affirmed.

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PHINEAS W. SPRAGUE, Respondent, *v.* THE WESTERN UNION  
TELEGRAPH COMPANY, Appellant.

(Argued April 4, 1876; decided April 11, 1876.)

THIS was a motion to dismiss an appeal on the ground that the case was not appealable under the amendment of 1874 to section 11 of the Code (chap. 322 Laws of 1874); and that no order had been obtained, as there required, authorizing the appeal. The judgment was less than \$500. An order was granted by a General Term succeeding the one that decided the appeal. It was objected that under the words of said section, requiring the order to be of "the General Term from whose decision or determination such an appeal shall be taken," no General Term save the one deciding the appeal could make the order. *Held*, untenable.



*Edward D. McCarthy* for the motion.

*George W. Soren* opposed.

Agree to deny motion. No opinion.

All concur.

Motion denied.

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BAHR JACOBOWSKY, Plaintiff in Error, *v.* THE PEOPLE OF THE  
STATE OF NEW YORK, Defendants in Error.

(Submitted March 30, 1876 ; decided April 11, 1876.)

REPORTED below, 6 Hun, 524.

*Wm. F. Howe* for the plaintiff in error.

*Benj. K. Phelps* for the defendants in error.

Agree to affirm on opinion of DANIELS, J., in court below.

All concur.

Judgment affirmed.

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CHARLES SHULTZ, Respondent, *v.* CLARISSA L. CRANE, Exec-  
utrix, etc., et al., Appellants.

(Argued March 30, 1876 ; decided April 11, 1876.)

REPORTED below, 6 Hun, 236.

*T. H. Baldwin* for the appellants.

*Geo. W. Carpenter* for the respondent.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

LOUISA SIMS, Respondent, *v.* HENRY B. BROWN, Appellant.

(Argued March 31, 1876 ; decided April 11, 1876.)

*N. Morey* for the appellant.

*E. Thayer* for the respondent.

Agree to affirm order and for judgment absolute against defendant.

All concur.

Order affirmed and judgment accordingly.

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WILLIAM KIDD et al., Appellants, *v.* MAHALA D. BOTTOM,  
impleaded, etc., Respondent.

(Submitted March 31, 1876 ; decided April 11, 1876.)

*W. C. Rowley* for the appellants.

*George F. Danforth* for the respondent.

Agree to affirm on opinion of referee.

All concur.

Judgment affirmed.

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EDWARD W. VANDERBILT, Administrator, etc., et al., Appellants, *v.* MARGARET E. ARMSTRONG, et al., Respondents.

(Argued March 31, 1876 ; decided April 11, 1876.)

*Richard H. Huntley* for the appellants.

*D. T. McMahon* for the respondents.

Agree to dismiss appeal. No opinion.

All concur.

Appeal dismissed.

THE PEOPLE ex rel. LUCY S. DEVELIN, Respondents, v.  
THOMAS B. ASTEN et al., Assessors, etc., Appellants.

(Argued April 4, 1876; decided April 11, 1876.)

REPORTED below, 4 Hun, 461.

*W. C. Whitney* for the appellants.

*Chas. E. Miller* for the respondents.

Agree to affirm on opinion of General Term.

All concur.

Order affirmed.

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EDGAR M. BIRDSALL, Appellant, v. CHARLES STROBRIDGE,  
Respondent.

(Argued April 4, 1876; decided April 11, 1876.)

*Brown & Wood* for the appellant.

*D. Morris* for the respondent.

Agree to dismiss appeal. No opinion.

All concur.

Appeal dismissed.

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THE PEOPLE ex rel. ELLEN M. YELVERTON, Respondents, v.  
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THE PEOPLE ex rel. THOMAS TONE, Respondents, v. THE  
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THE PEOPLE ex rel. EDWARD COLEGROVE, Respondents, v. THE  
SAME, Appellants.

THE PEOPLE ex rel. ELIZA DAVIES, Respondents, v. THE SAME,  
Appellants.

(Argued April 4, 1876; decided April 11, 1876.)

These cases presented the same questions, and were argued  
and decided with *People ex rel. Tytler v. Green*, ante p. 606.

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IN THE MATTER OF THE APPLICATION OF THE PROSPECT PARK  
AND CONEY ISLAND RAILROAD COMPANY TO ACQUIRE LANDS.

(Argued April 4, 1876; decided April 11, 1876.)

*H. B. Hubbard* for the appellant.

*John H. Bergen* for the respondent.

Agree to affirm. No opinion.

All concur.

Order affirmed.

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## APPEAL.

1. Where a respondent seeks to restrict the general right to appeal to this court by applying the limitation prescribed by the amendment of 1874 to section 11 of the Code (chap. 322, Laws of 1874), it is for him to show that the subject-matter of the controversy does not exceed \$500. *People v. Horton.* 58
2. This action was brought to restrain the carrying on of a business; no sum of money was demanded in the complaint, nor was the value of the business stated in the pleadings; judgment was given for the defendant. The testimony showed the yearly value of the business to be more than \$500. *Held*, that plaintiffs were entitled to appeal to this court. *Id.*
3. In an action upon a policy of life insurance the defence was the falsity of various answers to questions in the application which were, by the terms of the policy, made warranties. After the defendant's counsel had, upon the trial, specified certain answers which he claimed to be false, on motion to dismiss, in exceptions to the submission of questions to the jury and in requests to charge, he requested the court to charge that upon the policy and the evidence the plaintiff could not recover any thing beyond the amount of the last premium. *Held*, that the general objection

- did not entitle defendant to raise on appeal points as to the falsity of answers which were not specified, and as to which no question of law was raised and passed upon on the trial. *Boos v. W. M. L. Ins. Co.* 286
4. A General Term has no power to review a case upon the facts on appeal from the judgment where the trial was by jury; the only mode in which the facts can be brought before it for review is by appeal from order of Special Term or Circuit granting or refusing a new trial. *Id.*
5. In an action to recover damages for breach of contract, where plaintiff has recovered judgment allowing one item of damage claimed and rejecting another, he cannot retain the amount allowed and ask upon appeal for a re-trial as to the item rejected; if a reversal and new trial is granted, it must be of the entire judgment and claim. *Wolstenholme v. W. F. M. Co.* 272
6. This court has not authority upon affirmance of an order denying an application to vacate an assessment, to allow the petitioner a rehearing in the court below, or to authorize him to renew his application upon further proof; it can simply so frame its judgment that it shall not be an obstacle to the petitioner obtaining relief in the proper form, *i. e.*, that the affirmance be without prejudice to an application to the court below for relief. *In re Ingraham.* 310
7. A refusal of a referee to pass upon an objection to evidence at the time it is offered and the receipt thereof, with a reservation of the question as to its admissibility until the close of the case, is improper, but is not necessarily fatal to the judgment. (CHURCH, Ch. J., ALLEN and FOLGER, JJ., dissenting.) *Lathrop v. Bramhall.* 365
8. Such a reservation is to be considered upon appeal the same as if the objection had been overruled and an exception taken, and if the evidence were proper or could not have affected the rights of the objecting party injuriously, the reservation is not ground for reversal. (CHURCH, Ch. J., ALLEN and FOLGER, JJ., dissenting.) *Id.*
9. An order quashing a writ of *habeas corpus* can only be reviewed upon appeal. A writ of error will not lie in such case. *People ex rel. v. Conner.* 481
10. As to whether an order denying a motion to set off one judgment against another is reviewable here, *quære.* *Swift v. Prouty.* 545
11. Where, upon motion to punish a party for contempt in violating an injunction, there is legal evidence sufficient to call for the exercise of the judgment and discretion of the court, its decision is not reviewable here. *Mayor, etc., v. N. Y. and S. I. F. Co.* 623
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ASSESSMENT AND TAXATION.

1. The legislature has not power to authorize a municipal corporation to issue its obligations for the purpose of raising money wherewith to pay a subscription of said corporation to the capital stock of a private corporation, and to provide for the payment of such obligations by taxation; it has not power to tax for private purposes solely. *Weisner v. Village of D.* 91

2. The legislative power of taxation, at least as regards the purposes for which it is to be exercised, is not without limit, and it is within the province of the courts to examine and to determine whether, in a particular case, the extreme boundary of legislative power has been reached and passed; it must be made quite clear, however, that the legislature has erred before the court can interfere with its action. *Id.*

3. In proceedings to vacate an assessment for constructing a sewer in Ninety-first street, New York, it appeared that the petitioner being the owner of lands between Ninetieth and Ninety-second streets, conveyed a portion thereof bounded "north-easterly by the center line of Ninety-first street," subject to a right of way over the portion of said street so conveyed. The assessment was claimed to be invalid, because the corporation had not acquired title to the land of said street. *Held*, untenable; that it was not to be assumed, in the absence of proof, that the sewer was laid upon the petitioner's half of the street, or in the center thereof, and that a party, to avail himself of such an objection, must show affirmatively that his rights have been invaded; that as to the other half of the street, a permission from the owners would be sufficient to authorize the construction of the sewer, and it not appearing that any such permission was not given, or that the owners objected, the legal presumption was that permission was given; but that, if no consent was given, it was not a valid ground of

objection that a trespass had been committed upon the lands of another. *In re Ingraham.* 810

4. Also, *held*, that it was not unlawful to include in one contract the construction of two sewers disconnected with each other, but to be built in accordance with the plan adopted for sewerage in the district; and that it was proper to assess the expense thereof in one assessment. *Id.*

5. This court has not authority upon affirmance of an order denying an application to vacate an assessment, to allow the petitioner a rehearing in the court below, or to authorize him to renew his application upon further proof; it can simply so frame its judgment that it shall not be an obstacle to the petitioner obtaining relief in the proper form, *i. e.*, that the affirmance be without prejudice to an application to the court below for relief. *Id.*

6. As to whether, under the statutes of this State, there is any other method of taxation of a corporation than by assessing its capital stock at its actual value, without regard to the *situs* of the property, *quære.* *People ex rel. P. M. S. Co. v. Comrs. Taxes.* 541

7. Assuming that the personal property of a corporation located outside of the State is in any event entitled to exemption from taxation, a temporary absence is not sufficient to create the exemption; but the change of location must be permanent, positive and unequivocal. *Id.*

8. The fact that a steamship company, located for the purposes of taxation within this State, has invested a portion of its assets in steamships owned by and being built for it outside of the State, does not exempt it from taxation upon such vessels. *Id.*

9. In an affidavit presented to the commissioners of taxes and assessment for the city and county of New York, for the purpose of

claiming exemption from taxation upon vessels so being constructed, the value of the vessels was not shown, but simply the amounts paid upon account thereof to the contractors. *Held*, that the affidavit was fatally defective; that, if entitled to an exemption, the actual value should have been shown affirmatively and clearly.

*Id.*

10. The provision of the act of 1852, "to make permanent the grade of the streets and avenues of the city of New York" (§ 3, chap. 52, Laws of 1852), requiring an assessment of damages to the owners of lots fronting on a street or avenue in said city, in all cases where the grade thereof shall be changed, has not been repealed by subsequent legislation; it is applicable, irrespective of the authority changing the grade; and therefore such owners are entitled to damages for a change of grade made by the commissioners of the Central park. *People ex rel. Tytler v. Green.* 606

#### ASSIGNMENT.

1. A promise made by one person for a valuable consideration, paid by another, to pay the debts of the latter, is in legal effect a promise to pay creditors who are such at the time the promise is made. They acquire thereby additional security for the payment of their debts, which will pass as an incident on assignment of one of the debts secured, but the assignee takes it by a derivative title from the assignor, and no direct contract is created by the assignment between him and the promisor. *Barlow v. Myers.* 41
2. It is immaterial that the debts are upon negotiable instruments not due. In the absence of special words indicating such an intent, the promise is not to the persons holding the instruments at their maturity; and the interest of the assignee in the promise is subject to any equities on the part of the promisor existing against the debt while in the hands of the assignor. *Id.*

3. Where, therefore, defendant, in consideration of the transfer to her of the property of the firm of R. & W., promised to pay the debts of the firm, among which were certain promissory notes not due, then held by N. R., who before maturity assigned them to plaintiff, in an action upon the promise, *held*, that defendant could set off a claim held by her against N. R. *Id.*

4. It is the duty of an assignee of a non-negotiable chose in action, in order to protect himself against a payment by the debtor to the original creditor, to notify the former of the assignment; and in an action upon the demand where such a payment is established, the burden of proving notice prior to payment is upon the plaintiff. *Heermans v. Ellsworth.* 159

5. One F. transferred to plaintiff by deed in trust, among other things, a demand against defendant for money loaned. F. subsequently brought suit against plaintiff to set aside the trust, in which action defendant was sworn as a witness. Plaintiff succeeded in the litigation. In an action upon the claim defendant proved payment to F. Plaintiff requested the court to charge that the pendency of said action brought by F. was constructive notice to defendant of the existence of the trust deed. The court refused so to charge. *Held*, no error; that whether defendant had notice of the character of the action sufficient to put him upon inquiry was a question of fact for the jury. *Id.*

6. One who purchases the interest of a partner in a firm acquires simply a right to an accounting in respect to the partnership effects and to a share of the surplus remaining after payment of the partnership debts, deducting any balance that may be due from the vendor to his copartners upon an accounting. *Moss v. Gleason.* 204

7. An assignee of a mortgage takes it not only subject to all the equities existing between the par-



ties to the instrument, but to the equities which third persons could enforce against the assignor. *Greene v. Warnick.* 220

8. The only effect of recording the assignment of a mortgage, is to protect the assignee from a subsequent sale of the same mortgage; if the assignment be not recorded, it is void as against a subsequent purchaser of the same mortgage. *Id.*

9. B. executed at the same time two mortgages on certain real estate, one to M. G., and one to D., which it was understood were to be equal liens and to be recorded at the same time. M. G.'s mortgage was first recorded, and after D.'s mortgage was recorded, was assigned to E. G., and by him assigned to W., both being *bona fide* purchasers for value, without notice of the circumstances. *Held*, that W. took his assignment, subject to all the equities as between M. G. and D., and could claim no priority of lien because of his mortgage being first recorded; that M. G. was not a subsequent purchaser within the recording act, and even if W. could, by virtue of his assignment, be regarded as a subsequent purchaser of some interest in the real estate, he could claim no preference under the statute, as D.'s mortgage was recorded before the assignments. *Id.*

10. The right of a borrower to recover the excessive interest upon a usurious loan is assignable, and upon execution of an assignment in bankruptcy by the borrower vests in the assignee. *Wheelock v. Lee.* 242

— *Of note when transaction amounts to payment instead.*

*See* BILLS AND NOTES.

— *Sufficiency of, to transfer cause of action for accounting.*

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#### ASSIGNMENT FOR BENEFIT OF CREDITORS.

— *When assignee of insolvent*

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*See* PARTNERSHIP, 1.

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— *Action by, in name of people, when not maintainable.*

*See* NUISANCE, 3.

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— *By canal appraisers, action to set aside when improper.*

*See* CANALS, 1, 2.

#### BANKS AND BANKING.

1. The penalty recoverable from a national bank under the act of congress (U. S. R. S., § 5198), where a greater rate of interest than is allowed by law has been actually paid to and received by it, is twice the amount of the interest paid in excess of the legal rate, not twice the amount of the entire interest. *Hintermister v. First Nat. Bank.* 212

2. The forfeiture of the entire interest where more than lawful interest is received or reserved, attaches, and is enforceable only in actions brought to enforce the usurious contract. *Id.*

3. The party entitled to maintain the action is entitled to recover twice the amount he has paid for usury within two years prior to the commencement of the action, whether the amount was paid in one or several payments. *Id.*

4. *It seems*, that as the provision of the act of the legislature of this State of 1870 (chap. 163, Laws of 1870), amending the banking law of the State, was intended to put State banks upon an equality with national banks in respect to interest on loans and the penalties for taking usurious interest, it should receive the same interpretation as the act of congress; and as an interpretation has been given to the

act of congress by the United States Supreme Court (*F. and M. N. Bk. v. Deering*, 1 Otto, 29), the same interpretation will be applied to the State law. A debt, therefore, contracted, or obligation given for a usurious loan made by a State or national bank is not void, but the forfeiture is limited to the interest. *Id.*

### BANKRUPTCY.

1. The right of a borrower to recover the excessive interest upon a usurious loan is assignable, and upon execution of an assignment in bankruptcy by the borrower vests in the assignee. *Wheelock v. Lee*. 242
2. An assignee in bankruptcy, however, cannot maintain an action to compel a lender to deliver up collaterals turned out by the bankrupt to secure an usurious loan or to have an obligation given by him therefor declared void without paying or offering to pay the sum loaned. He is not a "borrower" within the meaning of the statute (chap. 430, Laws of 1837), authorizing a borrower to file his bill for relief without payment or deposit of the sum loaned; that word designates only the party bound by the original contract to pay the loan. *Id.*

### BEQUEST.

*See WILLS*, 3, 4, 6.

### BILLS, NOTES, CHECKS.

1. A written instrument acknowledging the receipt of a specified sum of money in paper currency for account of a person named, and promising to pay the same to such person or order "on return of this receipt" with interest, is a negotiable promissory note. The words "on return of this receipt" do not make it payable upon a contingency or constitute a condition precedent; and its being payable in paper currency will be taken as meaning legal tender paper currency. *Frank v. Wessels*. 155
2. Where such an instrument is lost and an action is brought thereon, the defendant is entitled to the indemnity provided by statute (2 R. S., 406, § 75) in actions upon lost negotiable instruments; and this, although it appears that the instrument has not been indorsed; indemnity must be given without regard to the fact of actual negotiation. *Id.*
3. M., R. and G. were partners. G., with the consent of his copartners, sold out his interest to B., who assumed all the liabilities of G. as a partner, and was received into the firm in his stead. The wife of G. at the time held a note made by the firm. M. & R. subsequently acquired the interest of B. At the time of these transfers the firm property was sufficient to pay all its debts. G. procured the note, then past due, and transferred it to M. in payment of a debt due to M. individually. M. transferred the note to plaintiff. In an action upon the note, *held*, that M., upon acquiring title to the note *eo instanti* acquired a right to a credit as between him and his partner for its amount as so much paid upon a partnership debt; that he could not have maintained an action against G., either upon the note or for a contribution, at least until he had first exhausted the partnership assets and shown a deficiency; and that as plaintiff took it subject to all the equities existing against it in the hands of M., he could not recover. *Morse v. Gleason*. 204
4. Defendant made his promissory note for the accommodation of the firm of Lambert & Lincoln, who procured it to be discounted and the proceeds were passed to their credit. Before the note matured Lincoln wrote to plaintiff to take up the note and to furnish money for that purpose. Plaintiff sent the money to Lincoln who placed it in bank to his individual credit, and on the day the note fell due took

up the note with his individual check. He did not assume to act for plaintiff or ask to have the note transferred to any one. He asked to have the note protested that he could hold the indorser and maker after protest. He sent the note to plaintiff. In an action upon the note, *held*, that plaintiff did not take title from the bank but from Lincoln, and subject to any defence against it in the hands of the latter; that the bank could not be made a seller without its knowledge or consent and did not transfer the note but only took payment; and that plaintiff could not recover. *Lancey v. Clark.* 209

5. The drawee of a bill of exchange, by accepting and paying it, only vouches for the genuineness of the signature of the drawer, not of the body of the instrument; the holder claiming to be entitled to receive the amount thereof is held to a knowledge of his own title and of the genuineness of every part of the bill save the signature of the drawer, and the drawee has a right to rely upon the presumptive ownership of the apparent holder. *White v. C. Nat. Bank.* 316

6. Plaintiffs, on the seventeenth of April, accepted and paid to defendant a bill drawn upon them, which before acceptance, had been altered by raising the amount. The bill had been deposited with the defendant, and the amount credited to the depositor; the forgery was not discovered until October fifth. In an action to recover back the money paid, *held* (MILLER, J., dissenting), that as defendant, in dealing with the bill or its avails, did not act upon the faith of any admission of plaintiffs, expressed or implied, as to the genuineness of the body of the instrument, or of any act or declaration on their part, but upon the apparent title and genuineness, and the responsibility of those from and through whom it received the bill, plaintiffs owed no duty to it in respect to the forgery, and that no negligence on their part could defeat their right of recovery. *Id.*

7. Also, *held*, that regarding the case as one of mutual mistake in re-

spect to which neither party was in fault, plaintiffs were entitled to recover. *Id.*

8. It is competent under the Code for one of two makers of a promissory note, in an action upon the note, to prove by parol that he signed the note as surety, to enable him to interpose as a defence that he was discharged by an extension of time given to the principal with knowledge of the suretyship. *Hubbard v. Gurney.* 457.

9. Such evidence does not alter or vary the written contract, as the fact proved simply operates, when knowledge of it is brought home to the creditor, to prevent him from changing the contract or making a different one with the principal debtor without the consent of the surety, or from impairing the rights of the latter by releasing any security or omitting to enforce the contract when requested. *Id.*

10. The authorities upon the question as to the competency and effect of such evidence collated and discussed. *Id.*

11. After the maturity of a note signed by defendant, as surety, and held by plaintiff, who had knowledge of the suretyship, the principal debtor executed a new note which was indorsed by plaintiff, discounted and the avails paid to him; when the note matured a small payment was made by the principal and a new note given. In an action upon the original note, *held*, that there was an implied agreement to extend the time of payment, which being done without the knowledge or consent of defendant, discharged him from liability; that the fact that the note in suit was not surrendered did not affect the character of the implied contract or its legal effect; and that the receipt of the money obtained upon the new note was a sufficient consideration, on the part of plaintiff, for such contract. *Id.*

12. Mere inadequacy of consideration, except as a circumstance

bearing upon the question of fraud or undue influence, is not a defence to a promissory note. *Earl v. Peck.* 596

18. Defendant's testator, having taken by mistake a fatal dose of aconite, and being aware of his approaching death, executed and delivered to plaintiff—who had been his housekeeper for seven or eight years, and to whom he was indebted for services—a promissory note for the sum of \$10,000, the consideration expressed being "for services rendered." In an action upon the note, *held*, that it was valid, although the amount was greater than the value of the services. *Id.*

— *Promise of third person to pay, when set-off proper in action on.*

*See ORDERS.*

SET-OFF, 1, 2.

## BOARD OF SUPERVISORS.

*See SUPERVISORS.*

## BONDS.

1. The legislature has not power to authorize a municipal corporation to issue its obligations for the purpose of raising money wherewith to pay a subscription of said corporation to the capital stock of a private corporation, and to provide for the payment of such obligations by taxation; it has not power to tax for private purposes solely. *Weismer v. Village of D.* 91
2. Accordingly, *held*, that the act (chap. 577, Laws of 1868) purporting to authorize defendant to subscribe for and take capital stock of the L. E. H. and M. Co., to issue its bonds to raise money to pay for such stock and to collect by taxation the moneys to pay said bonds, was unconstitutional and void, and the bonds issued thereunder invalid. *Id.*
3. A municipal corporation is not estopped from asserting the in-

validity of its bonds, by any conduct of its officers or agents, or by acts of acquiescence and approval on the part of the inhabitants of the municipality, after knowledge of the facts. *Id.*

4. The sureties upon a bond given by an employe to his employer, conditioned that the former will faithfully account for all moneys and property of the latter coming to his hands, are not discharged from subsequent liability by an omission on the part of the employer to notify them of a default on the part of their principal known to the employer, and a continuance of the employment after such default, in the absence of evidence of fraud and dishonesty on the part of the employe. *A. and P. T. Co. v. Barnes,* 385
5. *It seems*, that the rule is otherwise where the default is of a nature indicating want of integrity in the employe, and this is known to the employer. *Id.*

*See TOWN BONDING.*

## BOUNDARIES.

1. Where a deed describes the granted premises as beginning at the intersection of the exterior lines of two streets, the point thus established controls the other parts of the description, and lines running along the streets are thereby confined to the exterior lines of the streets, and the soil of the street is not included in the grant. *White's Bank of B. v. Nichols.* 65
2. Descriptions in grants are to be interpreted in reference to monuments and circumstances existing at the time, in the absence of any evidence in the grant that the parties contemplated a shifting boundary or any change in the lines; a change, therefore, in the point of intersection of two streets thus made the starting point, by a change in the width of one of the streets, will not extend or affect the grant. *Id.*

8. In an action of ejectment where-  
in the question was as to the  
location of a boundary line, it ap-  
peared that the adjoining owners  
for more than fifty years had  
occupied each on his side up to  
an old fence; that the fence had  
been kept up and maintained as  
a division fence for more than  
twenty years, each owner by  
agreement keeping up one-half.  
*Held*, that this was sufficient evi-  
dence of a practical location of  
and an acquiescence in the fence  
as the boundary line, and of a  
possession for more than twenty  
years in pursuance of such loca-  
tion to require the submission of  
that question to the jury. *Jones*  
*v. Smith.* 180

#### BUFFALO (CITY OF).

1. Under the provision of the char-  
ter of the city of Buffalo (chap.  
519, Laws of 1870), authorizing  
the city to take the fee of lands  
for corporate purposes, proceed-  
ings were instituted to take lands  
of a railroad company, in accord-  
ance with a resolution of the com-  
mon council. Upon appeal from  
an order appointing commission-  
ers, the General Term held that  
the court at Special Term "had  
no authority to inquire into any  
thing except the mere regularity  
of the proceedings and as to who  
should be commissioners." *Held*,  
error; that a legal question was  
presented, *i. e.*, as to whether, un-  
der the grant of power contained  
in the charter, the city was author-  
ized to appropriate the fee of lands  
held by a railroad company, also  
for public use, and acquired by the  
exercise of the right of eminent  
domain, which question the court  
hearing the application necessarily  
had the power to decide. *In re*  
*City of Buffalo.* 547
2. As to whether the charter confers  
the power to make such an appro-  
priation, *quære.* *Id.*

#### BUILDING CONTRACTS.

*See* CONTRACTS, 8, 9.

#### BURDEN OF PROOF.

It is the duty of an assignee of a  
non-negotiable chose in action, in  
order to protect himself against a  
payment by the debtor to the orig-  
inal creditor, to notify the former  
of the assignment; and in an ac-  
tion upon the demand where such  
a payment is established, the bur-  
den of proving notice prior to  
payment is upon the plaintiff.  
*Heermans v. Ellsworth.* 159

#### BURGLARY.

1. Where there are to the cellar-way  
of a dwelling-house two doors,  
one opening outwardly, the other  
opening into the cellar, the latter  
is an outer door of the house, and  
if closed and latched, the unlatch-  
ing and entering constitutes a  
breaking and entry, within the  
meaning of the statute relating to  
burglary. (2 R. S., 668, § 10, *et*  
*seq.*) *McCourt v. People.* 583
2. Plaintiff in error, with two com-  
panions, stopped at the house of  
C. in the day-time. He asked  
C.'s daughter, who was alone at  
home, for a drink of cider, offer-  
ing to pay for it. She refused to  
let him have it, and he thereupon  
opened the cellar door, although  
forbidden to do so by her, went  
in and drew some cider. He had  
procured cider there before, and  
was partially intoxicated at the  
time. He was indicted for burg-  
lary and larceny. Upon the trial  
his counsel requested the court to  
direct an acquittal, which was  
denied. *Held*, error; that the evi-  
dence failed to show that the  
accused entered with the intent to  
commit a crime; that while there  
was an evidence of an intent to  
obtain a drink of cider and thus  
to deprive C. of his property,  
there was an absence of the cir-  
cumstances ordinarily attending  
the commission of a larceny, and  
which distinguish it from a tres-  
pass, and that all the circum-  
stances were consistent with the  
view that the transaction was a  
trespass merely. *Id.*

## CANALS.

1. Under the provisions of the act of 1868 (chap. 520, Laws of 1868), providing for the payment of damages sustained by certain parties in the draining of the Cayuga marshes, an award was made by the canal appraisers to defendant V., who assigned the same to defendant W. This action was brought to set aside the award, on the ground that it was made by fraud and collusion between V. and the appraisers, and also for want of jurisdiction. *Held*, that as by said act the right of appeal to the canal board was given to either party, and as there was no allegation or proof that an appeal was prevented by fraud, collusion, accident or mistake, also as by various statutes ample power was given to the canal board to grant plaintiffs all the relief sought (chap. 368, Laws of 1829; chap. 201, Laws of 1840; chap. 836, Laws of 1866; chap. 579, Laws of 1868), a resort to an independent action was improper. *The People v. Wasson.* 167
2. The complaint also alleged the commencement of proceedings by defendant W. to enforce payment of the award by mandamus, and asked that he be enjoined from prosecuting such proceedings. *Held*, that as any defence, legal or equitable, going to the validity of the award, could have been set up by return to the writ, and as there was no allegation or proof that plaintiffs' rights could not be fully protected in the mandamus proceedings, those proceedings could not be enjoined by suit. *Id.*
3. Defendants were the owners of a floating elevator, which was used by them in the "Buffalo City Ship canal" (an artificial channel, forming part of the harbor of that city), for the purpose of transferring grain in bulk from lake vessels to canal boats, moving from place to place as required. When not in use it was moored opposite lands owned by defendants. The channel of the canal is 160 feet wide. When employed in unloading a vessel, with the

vessel on one side and a canal boat on the other, the three craft occupy less than eighty feet of the channel, and a transfer of the load of a vessel is made in a few hours. Vessels moving in the canal are moved by steam power. In an action by the attorney-general in behalf of the people, a judgment was rendered restraining such use, but allowing the use of the elevator for unloading vessels aground or for any other purpose. *Held*, error; that the use was not an unnecessary, unreasonable and unlawful use of the canal, or an unreasonable and unlawful obstruction to trade and commerce, but was in aid of commerce. *People v. Horton.* 610

## CANAL APPRAISERS.

*See* CANALS, 1, 2.

## CASES CRITICISED, DISTINGUISHED, LIMITED, REVERSED, OVER-RULED, MODIFIED AND QUESTIONED.

*Grant v. Shurter* (1 Wend., 148), distinguished. *Haines v. Hollister.* 4

*Laning v. N. Y. C. R. R. Co.* (49 N. Y., 521), distinguished. *Malone v. Hathaway.* 9

*Flike v. B. and A. R. R. Co.* (53 N. Y., 549), distinguished. *Malone v. Hathaway.* 10

*Dent v. Simmons* (7 J. J. Marsh. [Ky.] 42), distinguished. *Witbeck v. Van Rensselaer.* 31

*Clark v. N. Y. L. I. and T. Co.* (7 Lans., 322), reversed. *Clark v. N. Y. L. I. and T. Co.* 33

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*R. and S. R. R. Co. v. Davis* (48 N. Y., 187), distinguished. *In re N. Y. C. and H. R. R. Co.* 63

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*Contl. Nat. Bk. v. Nat. Bk. Comm.*, (50 N. Y. 575), distinguished. *White v. Contl. Nat. Bk.* 321

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*Day v. Pool* (52 N. Y., 416), distinguished. *Dounce v. Dow*. 416

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*Benjamin v. Arnold* (5 T. & C., 54), overruled. (*Hubbard v. Gurney*). 461

*Halliday v. Hart* (30 N. Y., 474), distinguished. *Hubbard v. Gurney*. 468

*Cary v. White* (52 N. Y., 138), distinguished. *Hubbard v. Gurney*. 468

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*Cordell v. N. Y. C. and H. R. R. Co.* (6 Hun, 461), reversed. *Cordell v. N. Y. C. and H. R. R. Co.* 535

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*Brooks v. Schwerin* (54 N. Y., 343), distinguished. *Reynolds v. Robinson*. 593

*Hart v. Mayor, etc., of Albany* (9 Wend., 571), distinguished. *People v. Horton*. 620

*Quinn v. Van Pelt* (56 N. Y., 417), distinguished. *Helms v. Goodwill*. 644

#### CAUSE OF ACTION.

1. An assignee for the benefit of creditors of an insolvent copartnership, the representatives of a deceased partner, and the surviving partners may properly be joined as parties defendant, and an action may properly be brought against them by a creditor of the firm, to compel the assignee to account and pay over to plaintiff his share of the proceeds of the partnership property, and (it being alleged in the complaint that the surviving partners are insolvent) to recover of the representatives the balance of plaintiff's claim. (ALLEN and EARL, JJ., dissenting.) *Haines v. Hollister*. 1
2. It is the duty of a town to provide means for the payment of its bonds lawfully issued. In case of failure to perform this duty, the holder of the bonds may maintain an action against the town thereon; and this, although by the act under which they were issued, it is made the duty of the board of supervisors of the county to impose and levy a tax to pay the bonds. *Marsh v. Town of Little Valley*. 112
3. Where one engaged in business enters into a copartnership with another for the purpose of continuing the business, and transfers its assets to the firm in consideration of an agreement of the firm



- to assume and pay certain specified debts incurred in the business, and to apply the assets first to the payment of said debts, the agreement is to be deemed as made for the benefit of the creditors holding the claims specified, and an action may be maintained by such a creditor against the firm upon such agreement. *Arnold v. Nichols*. 117
- 4. Under the provisions of the act of 1868 (chap. 520, Laws of 1868), providing for the payment of damages sustained by certain parties in the draining of the Cayuga marshes, an award was made by the canal appraisers to defendant V, who assigned the same to defendant W. This action was brought to set aside the award, on the ground that it was made by fraud and collusion between V. and the appraisers, and also for want of jurisdiction. *Held*, that as by said act the right of appeal to the canal board was given to either party, and as there was no allegation or proof that an appeal was prevented by fraud, collusion, accident or mistake, also as by various statutes ample power was given to the canal board to grant plaintiffs all the relief sought (chap. 368, Laws of 1829; chap. 201, Laws of 1840; chap. 836, Laws of 1866; chap. 579, Laws of 1868), a resort to an independent action was improper. *People v. Wasson*. 167
- 5. The complaint also alleged the commencement of proceedings by defendant W. to enforce payment of the award by mandamus, and asked that he be enjoined from prosecuting such proceedings. *Held*, that as any defence, legal or equitable, going to the validity of the award, could have been set up by return to the writ, and as there was no allegation or proof that plaintiffs' rights could not be fully protected in the mandamus proceedings, those proceedings could not be enjoined by suit. *Id.*
- 6. A suit in equity to rescind an agreement for the sale of real estate because of defect in title or want of power in the vendor to sell cannot be maintained, as the party has a perfect defence to any action brought against him to enforce the contract. *Bruner v. Meigs*. 506
- 7. As to whether an action can be maintained by one claiming a prior equitable lien upon personal property against a subsequent mortgagee upon the ground that defendant has so conducted himself in the exercise of his legal right of sale as unnecessarily to reduce the value of plaintiff's lien, *quære*. *Hale v. Omaha Nat. Bk.* 550
- 8. Such an action cannot be maintained where it appears that defendant did nothing but exercise his legal right to foreclose his mortgage and sell the interest of the mortgagor in the property. *Id.*
- 9. Plaintiff's complaint alleged, in substance, that he had an equitable lien upon certain personal property, which property defendant wrongfully sold and converted to its own use, thereby depriving plaintiff of his lien. It appeared that the property was taken and sold by defendant under and by virtue of certain chattel mortgages thereon. It did not appear that the property was sold in parcels or was scattered or dissipated, or that it was sold to a *bona fide* purchaser without notice of plaintiff's lien, or that the property was sold in hostility to plaintiff's rights. It did appear that the property was sold for its full value, but that only the rights and interests of the mortgagors and of defendant were sold. *Held*, that the fact that the property was sold for full value was insufficient to establish that the sale was hostile to plaintiff, and was not inconsistent with his right to enforce his lien; and that a cause of action for an injury to plaintiff's lien was not established. *Id.*
- 10. Plaintiff was employed by the L. C. and D. R. R. Co. to find contractors to build its road. He procured defendants to agree to enter into such contract. It was agreed that the company was to pay, as part of the consideration

for the work, \$250,000. At the close of the negotiation and when the agreement was being reduced to writing, it was further agreed that the sum to be paid defendants should be increased to \$255,000; that defendants should give to plaintiff, as compensation for his services, their order on the company for \$5,000, payable *pro rata*, as the money became due under the contract. The agreement was carried out, the contract executed and the order given and accepted by the company. The contract was subsequently and before any money became due under it, surrendered by defendants and canceled. In an action to recover the amount of the order, *held*, that it was given for a good consideration, and could not be defeated by default of the defendants, and that defendants were liable. *Risley v. Smith.* 576

11. Where a married man takes boarders into his house or converts it into a hospital for the sick, and his wife takes charge of his establishment or renders services in the house to boarders or sick persons, in the absence of proof of any special agreement, all her services and earnings belong to her husband, and he can maintain an action to recover therefor. *Reynolds v. Robinson.* 589

12. Where an agreement is made between two parties that compensation for services rendered by one to the other shall be made by a provision in the will of the latter, in case a provision is made sufficient only to compensate in part for the services, the party rendering them has, after the death of the other, a cause of action for the balance against his personal representatives. *Id.*

— *To recover money paid by mistake in raised draft.*

*See* BILLS, NOTES, ETC., 6, 7.

— *When forwarder not liable for loss in transportation.*

*See* FORWARDERS.

— *For trespass, what possession sufficient to sustain.*

*See* HUSBAND AND WIFE, 3, 4.

— *Payment of damages on injunction, undertaking can only be enforced.*

*See* INJUNCTION, 5.

— *Against one person for injury resulting from independent acts of negligence of himself and another.*

*See* NEGLIGENCE, 6, 7.

— *Misjoinder of causes of action.*

*See* PLEADINGS, 2, 3, 4.

— *To recover back purchase-money paid under contract for sale of land, because of failure of consideration, when maintainable.*

*See* WILLS, 6.

— *When action by tax-payers to enjoin payment of city bonds not maintainable.*

*See* *Comins v. Bd. Suprs.* (Mem.) 626.

## · CHALLENGE OF JURORS.

*See* JURY.

## CHATTEL MORTGAGE.

1. As to whether an action can be maintained by one claiming a prior equitable lien upon personal property against a subsequent mortgagee upon the ground that defendant has so conducted himself in the exercise of his legal right of sale as unnecessarily to reduce the value of plaintiff's lien, *quære.* *Hale v. Omaha Nat. Bk.* 550

2. Such an action cannot be maintained where it appears that defendant did nothing but exercise his legal right to foreclose his mortgage and sell the interest of the mortgagor in the property. *Id.*

3. Plaintiff's complaint alleged, in substance, that he had an equitable lien upon certain personal property, which property defendant wrongfully sold and converted to its own use, thereby depriving plaintiff of his lien. It appeared that the property was taken and sold by defendant under and by virtue of certain chattel mortgages thereon. It did not appear that the property was sold in parcels or was scattered or dissipated, or that it was sold to a *bona fide*

purchaser without notice of plaintiff's lien, or that the property was sold in hostility to plaintiff's rights. It did appear that the property was sold for its full value, but that only the rights and interests of the mortgagors and of defendant were sold. *Held*, that the fact that the property was sold for full value was insufficient to establish that the sale was hostile to plaintiff, and was not inconsistent with his right to enforce his lien; and that a cause of action for an injury to plaintiff's lien was not established. *Id.*

### CODE OF PROCEDURE.

- 11. *See* APPEAL, 1.
- 167. *See* PLEADINGS, 4.
- 122. *See* INJUNCTION, 1.
- 284. *See* EXECUTION, 3.
- 876. *See* EXECUTION, 2.
- 891. *See* PARTIES, 5.

### COMMON CARRIER.

1. It is the duty of a common carrier, not only to transport, but to deliver or offer to deliver, goods to the consignee within a reasonable time. Where the consignee is unknown, a reasonable and diligent effort to find and notify him of the arrival is a condition precedent to a right to warehouse the goods. If such effort be not made the carrier is liable for the damages resulting from the neglect. *Sherman v. H. R. R. Co.* 254
2. The measure of damages is the difference in the value of the goods at the time and place they ought to have been delivered and the time of their actual delivery; in fixing the time when delivery should have been made, where there is no charge of negligence in transportation, a reasonable time after arrival should be allowed for delivery. *Id.*
3. In the case of the transportation of property over several railroads constituting a connecting line, neither company is agent of

the owner; each exercises an independent employment as a contractor with the owner and is responsible for its own negligence, and it cannot make the owner responsible for the negligence of a connecting road. *Id.*

4. Certain bales of cotton owned by plaintiffs were shipped at C., consigned to "Byron Sherman," New York. They were delivered to defendant at A., by a connecting line, with a freight bill in which was stated the number of and the marks upon the bales, but the consignee's name was given as "Ryan Sherman." The cotton was transported by the defendant to New York; the name of the consignee was changed by it in its entries and bills to "Ryan & Sherman." Not finding such a firm defendant warehoused the cotton. Byron Sherman called at defendant's freight office in New York, about the time of the arrival of the cotton, and several times thereafter with the bill of lading containing the number of bales and marks thereon which he exhibited, and inquired for the cotton, but could obtain no information. In an action for negligence, *held*, that plaintiff was entitled to recover; that the evidence was sufficient to justify a finding that the delay and consequent injury was caused solely by defendant's mistake; that while defendant was only chargeable with its own negligence, plaintiff could not be made responsible for the negligence of the connecting line. *Id.*

— When forwarder does not become liable as carrier.  
*See* FORWARDER, 1.

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Where, upon the failure of one party to perform his contract within the time specified, the time

is extended upon a certain condition, a performance of the condition is requisite to enable the party to avail himself of the extension. *Levy v. Burgess.* 390

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— *Sufficiency of.*

See CONTRACTS, 16.

— *When contract void for want of.*

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— *Failure of, on contract for sale of lands, because of defect in title.*

See WILLS, 6.

### CONSTITUTIONAL LAW.

1. The legislative power of taxation, at least as regards the purposes for which it is to be exercised, is not without limit, and it is within the province of the courts to examine and to determine whether, in a particular case, the extreme boundary of legislative power has been reached and passed; it must be made quite clear, however, that the legislature has erred before the court can interfere with its action. *Weisner v. Village of D.* 91

2. The legislature has not power to authorize a municipal corporation to issue its obligations for the purpose of raising money wherewith to pay a subscription of said corporation to the capital stock of a private corporation, and to provide for the payment of such obligations by taxation; it has not power to tax for private purposes solely. *Id.*

3. Accordingly, *held*, that the act (chap. 577, Laws of 1868) purporting to authorize defendant to subscribe for and take capital

stock of the L. E. H. and M. Co., to issue its bonds to raise money to pay for such stock, and to collect by taxation the moneys to pay said bonds, was unconstitutional and void, and the bonds issued thereunder invalid. *Id.*

4. A law of the State suspending or discontinuing a public work under contract, or providing for its performance by different agencies, is not subject to any constitutional objection because the change authorized involves a breach of the contract; the obligation of the contract is not impaired by the refusal of the State to perform it; the contractor, if not in default, has a just claim against the State for damages resulting from the breach and a remedy by appeal to the legislature. *Lord v. Thomas.* 107

5. Accordingly *held*, that the act of 1874 (chap. 323, Laws of 1874), suspending the commissioners appointed under the act of 1870 (chap. 427, Laws of 1870) to construct a State reformatory at Elmira, and providing for the appointment of a superintending builder with power to contract for a completion of a certain portion of the work upon a changed plan, etc., although in effect a refusal to proceed under the plans and contracts then existing for the work, and a violation of such a contract, was not unconstitutional, and that an action could not be maintained at the suit of a contractor to restrain the superintending builder, appointed under said act of 1874, from entering into a new contract under the authority of and in the manner prescribed by said act. *Id.*

6. An act declaring any circumstance or any evidence, however slight, *prima facie* proof of a fact is valid. *Howard v. Moot.* 262

7. Accordingly *held*, that the act to perpetuate certain testimony respecting the title to the Pulteney estate (chap. 19, Laws of 1821), was constitutional and valid. *Id.*

## CONTEMPT.

1. Where, upon motion to punish a party for contempt in violating an injunction there is legal evidence sufficient to call for the exercise of the judgment and discretion of the court, its decision is not reviewable here. *Mayor, etc., v. N. Y. and S. I. F. Co.* 623
2. A party, bound to obey an injunction, may be guilty of a violation thereof as well by aiding, abetting and countenancing others in violating it as by doing it directly; such orders must be honestly and fairly obeyed. *Id.*
3. Where proceedings to punish a party for contempt, in violating an injunction, are commenced by an order to show cause, interrogatories need not be filed prior to a final adjudication upon the alleged contempt. *Id.*

— Order refusing to punish for, not appealable.

*See Sutton v. Davis.* (Mem.) 635

## CONTRACTS.

1. K. and M. and wife entered into a contract which, after reciting that the parties were the owners of divers lots of land on either side of Twenty-second street, between Fourth avenue and Broadway, in the city of New York; that dwelling-houses had been erected on each side of said street, with a court-yard seven and a-half feet in front, and that the parties deemed it for their mutual advantage that the "lots fronting on said street" should be occupied exclusively by dwelling-houses, the fronts of which should be placed seven and a-half feet back from the line of the street, contained an agreement that so much of their respective lots as were contained between the line of the street and a line seven and a-half feet therefrom should "remain and be enjoyed as a court-yard in front of any houses to be erected on said lots." The parties, at the time of making the agreement, had before them a map

made several years before, by which the lots on Broadway and Fourth avenue were laid out twenty-five feet wide and ninety-six feet deep, while the intermediate lots were twenty-five feet on Twenty-second street and ninety-six feet deep. In an action brought by plaintiff, who subsequently purchased one of the lots on Twenty-second street to restrain defendant from building on a corner lot on Broadway up to the line of Twenty-second street, *held*, that it was to be assumed that the parties, in making the contract, had in contemplation the lots as laid out and designated on the map; that the corner lots fronted respectively on Broadway and Fourth avenue, and it was only the intermediate lots which fronted on Twenty-second street within the meaning of the contract; and that, therefore, the lot in question was not included in said provision of the contract, and defendants could not be restrained from building thereon up to the line of Twenty-second street. *Clark v. N. Y. L. I. and T. Co.* 33

2. A promise made by one person for a valuable consideration, paid by another, to pay the debts of the latter, is, in legal effect, a promise to pay creditors who are such at the time the promise is made. They acquire thereby additional security for the payment of their debts, which will pass as an incident on assignment of one of the debts secured, but the assignee takes it by a derivative title from the assignor, and no direct contract is created by the assignment between him and the promisor. *Barlow v. Myers.* 41
3. It is immaterial that the debts are upon negotiable instruments not due. In the absence of special words indicating such an intent, the promise is not to the persons holding the instruments at their maturity; and the interest of the assignee in the promise is subject to any equities on the part of the promisor existing against the debt while in the hands of the assignor. *Id.*

4. The State cannot be compelled to proceed with the erection of a public building or the prosecution of a public work at the instance of a contractor therefor. *Lord v. Thomas.* 107
5. A law of the State suspending or discontinuing a public work under contract, or providing for its performance by different agencies, is not subject to any constitutional objection because the change authorized involves a breach of the contract; the obligation of the contract is not impaired by the refusal of the State to perform it; the contractor, if not in default, has a just claim against the State for damages resulting from the breach, and a remedy by appeal to the legislature. *Id.*
6. Accordingly *held*, that the act of 1874 (chap. 328, Laws of 1874), suspending the commissioners appointed under the act of 1870 (chap. 427, Laws of 1870) to construct a State reformatory at Elmira, and providing for the appointment of a superintending builder with power to contract for a completion of a certain portion of the work upon a changed plan, etc., although in effect a refusal to proceed under the plans and contracts then existing for the work, and a violation of such a contract, was not unconstitutional, and that an action could not be maintained at the suit of a contractor to restrain the superintending builder, appointed under said act of 1874, from entering into a new contract under the authority of and in the manner prescribed by said act. *Id.*
7. Where one engaged in business enters into a copartnership with another for the purpose of continuing the business, and transfers its assets to the firm in consideration of an agreement of the firm to assume and pay certain specified debts incurred in the business, and to apply the assets first to the payment of said debts, the agreement is to be deemed as made for the benefit of the creditors holding the claims specified, and an action may be maintained by such a creditor against the firm upon such agreement. *Arnold v. Nichols.* 117
8. A contractor for the erection of a building who sub-contracts a portion of the work and reserves no control or authority over or right to direct as to the manner of performance, save generally to insist that the work be done according to the terms of the sub-contract, is not liable to a third person for an injury caused by the negligent act of the sub-contractor. *Slater v. Mercereau.* 138
9. Defendant contracted to erect a building on land of A. & Co., the work to be done under the direction of an architect named. Defendant sub-contracted the mason work to B. & M., who contracted to cut, when directed, a recess in the wall to receive a waste pipe to convey water from the roof to a sewer. B. & M. not having received directions did not cut the recess after the roof was on, and in consequence the water from the roof, during a rain storm, ran into the cellar where it was joined by water from the street, let in through the negligence of B. & M. in constructing an area in front of the building. The water found its way through the walls into plaintiffs' building adjoining, injuring their goods. In an action to recover damages for the injury, *held*, that the power given to the architect for the protection of the owner to direct was simply as to the fitness of the materials and the manner the work was done, not as to the time; that it was defendant's duty to direct the necessary work to be done to convey off the water from the roof, and it was negligence on his part in failing to do so in proper time; that he was not liable for the negligence of B. & M. in constructing the area, but as their acts of negligence and his own united to cause the injury, he was properly held liable for the whole. *Id.*
10. An executory contract under seal for the purchase of lands, executed by the vendee in his own name, cannot be enforced as the simple contract of another not



mentioned in or a party to the instrument, on proof that the vendee named had oral authority from such other to enter into the contract, and acted as his agent in the transaction; at least in the absence of proof of some act of ratification on the part of the undisclosed principal. *Briggs v. Partridge.* 358

11. *It seems*, that in case of a simple contract the rule is otherwise and the principal is bound. *Id.*

12. Where, upon failure of one party to perform his contract within the time specified, the time is extended upon a certain condition, a performance of the condition is requisite to enable the party to avail himself of the extension. *Levy v. Burgess.* 390

18. Defendant contracted to purchase of plaintiffs certain railroad bonds indorsed by the State of A., to be delivered and paid for at a specified time and place. Defendant attended at the time and place to receive the bonds, but plaintiffs were unable to perform. Defendant informed plaintiffs that they could deliver within a certain time to his brokers, M. & T., bonds, the indorsements upon which were signed by the governor of A. as governor; said brokers were authorized to receive and pay for the bonds if so signed, but not otherwise. Plaintiff had contracted with H. for the bonds, who offered bonds, a portion of which were signed by the governor, but without the addition of his name of office. H. allowed plaintiff to take the bonds to tender to M. & T., under an agreement that, if accepted, plaintiff would accept them as a good delivery on the contract of H. The bonds were tendered within the time, but M. & T. refused to accept because not indorsed as prescribed, and the bonds were returned to H. In an action upon the contract, *held*, that by the failure of plaintiffs to perform at the time agreed upon, defendant was discharged unless he waived his right or extended the time; that to avail themselves of the extension plaintiffs were bound

to comply with the condition imposed, and a tender of bonds of a different description, although the indorsement was a valid indorsement of the State, was insufficient; also, that a tender to M. & T. of bonds, which, as plaintiffs knew they were not authorized to accept, was not equivalent to a tender to defendant. *Id.*

14. The board of public works of the city of R. passed an ordinance providing for the deepening and enlarging of a sewer, by enlarging a portion, constructing a tunnel under a race and deepening another portion. Bids were advertised for and received which were so much per foot for "open cut" and so much for tunneling. The contract was awarded to S., a portion to be "open cut" and the portion under the race tunneled. The board subsequently resolved that the work should be entirely tunneled, and a contract was entered into with S., without a readvertisement, at the figures in his bid, which were five dollars per foot more for tunneling than for "open cut." In an action brought by persons assessed for the sewer, wherein judgment was obtained restraining the payment of any money for tunneling, save for the portion under the race; *held*, that the contract entered into was authorized by the ordinance, as the provision for deepening included any mode by which the work could be accomplished which the board, in the exercise of a reasonable discretion, should deem proper; that as the petition presented did not designate any particular mode of doing the work, there was no violation of the provision of the act of 1872 amending the city charter (§ 7, chap. 771, Laws of 1872), conferring upon the owners the right to designate the kind of improvement; that having complied with the provision of said act (§ 8), requiring advertisements for proposals, the board was not required to advertise again, but had the authority to make the change before a contract in writing was entered into, and to adopt the proposal for tunneling in the accepted bid. *Lutes v. Briggs.* 404

for the work, \$250,000. At the close of the negotiation and when the agreement was being reduced to writing, it was further agreed that the sum to be paid defendants should be increased to \$255,000; that defendants should give to plaintiff, as compensation for his services, their order on the company for \$5,000, payable *pro rata*, as the money became due under the contract. The agreement was carried out, the contract executed and the order given and accepted by the company. The contract was subsequently and before any money became due under it, surrendered by defendants and canceled. In an action to recover the amount of the order, *held*, that it was given for a good consideration, and could not be defeated by default of the defendants, and that defendants were liable. *Risley v. Smith.* 576

11. Where a married man takes boarders into his house or converts it into a hospital for the sick, and his wife takes charge of his establishment or renders services in the house to boarders or sick persons, in the absence of proof of any special agreement, all her services and earnings belong to her husband, and he can maintain an action to recover therefor. *Reynolds v. Robinson.* 589

12. Where an agreement is made between two parties that compensation for services rendered by one to the other shall be made by a provision in the will of the latter, in case a provision is made sufficient only to compensate in part for the services, the party rendering them has, after the death of the other, a cause of action for the balance against his personal representatives. *Id.*

— *To recover money paid by mistake in raised draft.*

*See* BILLS, NOTES, ETC., 6, 7.

— *When forwarder not liable for loss in transportation.*

*See* FORWARDERS.

— *For trespass, what possession sufficient to sustain.*

*See* HUSBAND AND WIFE, 3, 4.

— *Payment of damages on injunction, undertaking can only be enforced.*

*See* INJUNCTION, 5.

— *Against one person for injury resulting from independent acts of negligence of himself and another.*

*See* NEGLIGENCE, 6, 7.

— *Misjoinder of causes of action.*

*See* PLEADINGS, 2, 3, 4.

— *To recover back purchase-money paid under contract for sale of land, because of failure of consideration, when maintainable.*

*See* WILLS, 6.

— *When action by tax-payers to enjoin payment of city bonds not maintainable.*

*See* *Comins v. Bd. Suprs.* (Mem.) 626.

## · CHALLENGE OF JURORS.

*See* JURY.

## CHATTEL MORTGAGE.

1. As to whether an action can be maintained by one claiming a prior equitable lien upon personal property against a subsequent mortgagee upon the ground that defendant has so conducted himself in the exercise of his legal right of sale as unnecessarily to reduce the value of plaintiff's lien, *quære.* *Hale v. Omaha Nat. Bk.* 550

2. Such an action cannot be maintained where it appears that defendant did nothing but exercise his legal right to foreclose his mortgage and sell the interest of the mortgagor in the property. *Id.*

3. Plaintiff's complaint alleged, in substance, that he had an equitable lien upon certain personal property, which property defendant wrongfully sold and converted to its own use, thereby depriving plaintiff of his lien. It appeared that the property was taken and sold by defendant under and by virtue of certain chattel mortgages thereon. It did not appear that the property was sold in parcels or was scattered or dissipated, or that it was sold to a *bona fide*



purchaser without notice of plaintiff's lien, or that the property was sold in hostility to plaintiff's rights. It did appear that the property was sold for its full value, but that only the rights and interests of the mortgagors and of defendant were sold. *Held*, that the fact that the property was sold for full value was insufficient to establish that the sale was hostile to plaintiff, and was not inconsistent with his right to enforce his lien; and that a cause of action for an injury to plaintiff's lien was not established. *Id.*

### CODE OF PROCEDURE.

11. *See* APPEAL, 1.  
167. *See* PLEADINGS, 4.  
122. *See* INJUNCTION, 1.  
284. *See* EXECUTION, 3.  
376. *See* EXECUTION, 2.  
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1. It is the duty of a common carrier, not only to transport, but to deliver or offer to deliver, goods to the consignee within a reasonable time. Where the consignee is unknown, a reasonable and diligent effort to find and notify him of the arrival is a condition precedent to a right to warehouse the goods. If such effort be not made the carrier is liable for the damages resulting from the neglect. *Sherman v. H. R. R. Co.* 254
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the owner; each exercises an independent employment as a contractor with the owner and is responsible for its own negligence, and it cannot make the owner responsible for the negligence of a connecting road. *Id.*

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4. A law of the State suspending or discontinuing a public work under contract, or providing for its performance by different agencies, is not subject to any constitutional objection because the change authorized involves a breach of the contract; the obligation of the contract is not impaired by the refusal of the State to perform it; the contractor, if not in default, has a just claim against the State for damages resulting from the breach and a remedy by appeal to the legislature. *Lord v. Thomas.* 107

5. Accordingly *held*, that the act of 1874 (chap. 828, Laws of 1874), suspending the commissioners appointed under the act of 1870 (chap. 427, Laws of 1870) to construct a State reformatory at Elmira, and providing for the appointment of a superintending builder with power to contract for a completion of a certain portion of the work upon a changed plan, etc., although in effect a refusal to proceed under the plans and contracts then existing for the work, and a violation of such a contract, was not unconstitutional, and that an action could not be maintained at the suit of a contractor to restrain the superintending builder, appointed under said act of 1874, from entering into a new contract under the authority of and in the manner prescribed by said act. *Id.*

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11. *It seems*, that in case of a simple contract the rule is otherwise and the principal is bound. *Id.*

12. Where, upon failure of one party to perform his contract within the time specified, the time is extended upon a certain condition, a performance of the condition is requisite to enable the party to avail himself of the extension. *Levy v. Burgess.* 390

13. Defendant contracted to purchase of plaintiffs certain railroad bonds indorsed by the State of A., to be delivered and paid for at a specified time and place. Defendant attended at the time and place to receive the bonds, but plaintiffs were unable to perform. Defendant informed plaintiffs that they could deliver within a certain time to his brokers, M. & T., bonds, the indorsements upon which were signed by the governor of A. *as governor*; said brokers were authorized to receive and pay for the bonds if so signed, but not otherwise. Plaintiff had contracted with H. for the bonds, who offered bonds, a portion of which were signed by the governor, but without the addition of his name of office. H. allowed plaintiff to take the bonds to tender to M. & T., under an agreement that, if accepted, plaintiff would accept them as a good delivery on the contract of H. The bonds were tendered within the time, but M. & T. refused to accept because not indorsed as prescribed, and the bonds were returned to H. In an action upon the contract, *held*, that by the failure of plaintiffs to perform at the time agreed upon, defendant was discharged unless he waived his right or extended the time; that to avail themselves of the extension plaintiffs were bound

to comply with the condition imposed, and a tender of bonds of a different description, although the indorsement was a valid indorsement of the State, was insufficient; also, that a tender to M. & T. of bonds, which, as plaintiffs knew they were not authorized to accept, was not equivalent to a tender to defendant. *Id.*

14. The board of public works of the city of R. passed an ordinance providing for the deepening and enlarging of a sewer, by enlarging a portion, constructing a tunnel under a race and deepening another portion. Bids were advertised for and received which were so much per foot for "open cut" and so much for tunneling. The contract was awarded to S., a portion to be "open cut" and the portion under the race tunneled. The board subsequently resolved that the work should be entirely tunneled, and a contract was entered into with S., without a readvertisement, at the figures in his bid, which were five dollars per foot more for tunneling than for "open cut." In an action brought by persons assessed for the sewer, wherein judgment was obtained restraining the payment of any money for tunneling, save for the portion under the race; *held*, that the contract entered into was authorized by the ordinance, as the provision for deepening included any mode by which the work could be accomplished which the board, in the exercise of a reasonable discretion, should deem proper; that as the petition presented did not designate any particular mode of doing the work, there was no violation of the provision of the act of 1872 amending the city charter (§ 7, chap. 771, Laws of 1872), conferring upon the owners the right to designate the kind of improvement; that having complied with the provision of said act (§ 8), requiring advertisements for proposals, the board was not required to advertise again, but had the authority to make the change before a contract in writing was entered into, and to adopt the proposal for tunneling in the accepted bid. *Lutes v. Briggs.* 404



15. To justify a court of equity in changing the language of a written instrument sought to be reformed, in the absence of fraud, it must be established that both parties agreed to something different from what is expressed in the writing, and the proof should be so clear and convincing as to leave no room for doubt. *Mead v. W. F. Ins. Co.* 453

16. Plaintiff was employed by the I. C. and D. R. R. Co. to find contractors to build its road. He procured defendants to agree to enter into such contract. It was agreed that the company was to pay, as part of the consideration for the work, \$250,000. At the close of the negotiation and when the agreement was being reduced to writing, it was further agreed that the sum to be paid defendants should be increased to \$255,000; that defendants should give to plaintiff, as compensation for his services, their order on the company for \$5,000, payable *pro rata*, as the money became due under the contract. The agreement was carried out, the contract executed and the order given and accepted by the company. The contract was subsequently, and before any money became due under it, surrendered by defendants and canceled. In an action to recover the amount of the order, *held*, that it was given for a good consideration, and could not be defeated by default of the defendants; and that defendants were liable. *Risley v. Smith.* 576

17. Where an agreement is made between two parties that compensation for services rendered by one to the other shall be made by a provision in the will of the latter, in case a provision is made sufficient only to compensate in part for the services, the party rendering them has, after the death of the other, a cause of action for the balance against his personal representatives. *Reynolds v. Robinson.* 589

See INSURANCE (FIRE).  
INSURANCE (LIFE).  
LANDLORD AND TENANT.  
SALES.

— *For sale of land, failure of consideration because of defect in title*  
See WILLS, 6.

## CONVERSION.

— *When next of kin, instead of personal representatives, are proper parties plaintiff, in action for.*  
See WILLS, 5.

— *When action for, not maintainable by agent against his principal.*  
See *Voltz v. Blackmar.* (Mem.) 644

## CORPORATIONS.

1. As to whether, under the statutes of this State, there is any other method of taxation of a corporation than by assessing its capital stock at its actual value, without regard to the *situs* of the property, *quære.* *People ex rel. P. M. S. Co. v. Comrs. Taxes.* 541

2. Assuming that the personal property of a corporation located outside of the State is in any event entitled to exemption from taxation, a temporary absence is not sufficient to create the exemption; but the change of location must be permanent, positive and unequivocal. *Id.*

3. The fact that a steamship company, located for the purpose of taxation within this State, has invested a portion of its assets in steamships owned by and being built for it outside of the State, does not exempt it from taxation upon such vessels. *Id.*

4. In an affidavit presented to the commissioners of taxes and assessment for the city and county of New York, for the purpose of claiming exemption from taxation upon vessels so being constructed, the value of the vessels was not shown, but simply the amounts paid upon account thereof to the contractors. *Held*, that the affidavit was fatally defective; that, if entitled to an exemption, the actual value should have been shown affirmatively and clearly. *Id.*

5. The estate and interest of a corporation in real property, although but an easement, is subject to levy and sale on execution, as property distinguished from the franchise of the corporation. *Ex. Orphan Home v. Buff. H. Assn.* 561

6. Corporations may be restrained by injunction, and may be fined for violating the injunction. *Mayor, etc., v. N. Y. and S. I. F. Co.* 622

See INSURANCE (FIRE).  
INSURANCE (LIFE).  
MANUFACTURING CORPORATIONS.  
MUNICIPAL CORPORATIONS.  
RAILROAD CORPORATIONS.  
RELIGIOUS CORPORATIONS.

### COUNTER-CLAIM

— *For loss in transportation, when not sustainable in action by forwarder for commissions.*

See FORWARDER, 1

### COUNTY CANVASSERS (BOARD OF).

See ELECTIONS, 1, 2, 3.

### COVENANT.

— *On sale of business, not to engage in same business, what is breach of.*

See SALES, 1, 2

### CRIMINAL TRIAL.

1. In an indictment for perjury alleged to have been committed on an investigation before the fire marshal, it was alleged that the accused swore there were 60,000 cigars in the building at the time of the fire. The proof was that he swore there were 65,000 cigars. This was one of various items of property as to which the accused was charged with having sworn falsely. On error it was objected that there was a fatal variance

between the indictment and the proof. The objection was not taken on the trial. *Held*, that it was not available here, as if made upon the trial, the evidence as to this item could have been excluded or waived, and the jury directed to disregard it, and the conviction could have been sustained upon the proof as to the other items. Also, *held*, that the variance was not material. *Harris v. The People.* 148

2. When an indictment charges that the accused has sworn falsely as to several facts, it is not necessary to prove all that is charged. It is sufficient to prove enough to make out the offence. *Id.*

3. There were two counts in the indictment, the first charging perjury in the oral testimony given before the fire marshal, and the other perjury in swearing to an affidavit before the same officer, containing in substance the same matters as testified to orally. The jury found the prisoner not guilty under the first count and guilty under the second. It was claimed that the verdict was inconsistent. It appeared that a portion of the oral testimony was taken when the fire marshal was not present. *Held*, that the objection was untenable, as the jury may have found that the oral testimony alleged to be false was not taken before the marshal. *Id.*

4. Plaintiff in error, with two companions, stopped at the house of C. in the day-time. He asked C.'s daughter, who was alone at home, for a drink of cider, offering to pay for it. She refused to let him have it, and he thereupon opened the cellar door, although forbidden to do so by her, went in and drew some cider. He had procured cider there before, and was partially intoxicated at the time. He was indicted for burglary and larceny. Upon the trial his counsel requested the court to direct an acquittal, which was denied. *Held*, error; that the evidence failed to show that the accused entered with intent to commit a crime; that while there was an

evidence of an intent to obtain a drink of cider and thus to deprive C. of his property, there was an absence of the circumstances ordinarily attending the commission of a larceny, and which distinguish it from a trespass, and that all the circumstances were consistent with the view that the transaction was a trespass merely. *McCourt v. People.* 588

— *Plea in abatement to indictment, because of alleged irregularity in drawing grand jury, when not good.*

See INDIOTMENT, 5, 6, 7.

### DAMAGES.

The measure of damages in action against a common carrier for neglect to deliver goods is the difference in the value of the goods at the time and place they ought to have been delivered and the time of their actual delivery; in fixing the time when delivery should have been made, where there is no charge of negligence in transportation, a reasonable time after arrival should be allowed for delivery. *Sherman v. H. R. R. Co.* 254

— *In ejectment.*

See EJECTMENT, 13, 14.

— *Evidence, when exemplary damages are claimed.*

See EVIDENCE, 6.

### DEBTOR AND CREDITOR.

— *On injunction, undertaking limited to amount specified therein.*

See INJUNCTION, 2, 3.

— *Promise of third person to pay debts, when enforceable.*

See PARTNERSHIP, 4.

### DEEDS.

1. Where a deed describes the granted premises as beginning at the intersection of the exterior lines of two streets, the point thus established controls the other parts of the description, and lines

running along the streets are thereby confined to the exterior lines of the streets, and the soil of the street is not included in the grant. *White's Bank of B. v. Nichols.* 65

2. Descriptions in grants are to be interpreted in reference to monuments and circumstances existing at the time, in the absence of any evidence in the grant that the parties contemplated a shifting boundary or any change in the lines; a change, therefore, in the point of intersection of two streets thus made the starting point, by a change in the width of one of the streets, will not extend or affect the grant. *Id.*

8. An owner of an easement does not, by asserting a right to the fee of the servient estate, and by taking possession thereof, destroy his right to the easement. No acts of such owner will extinguish his right, save those that indicate his intention to abandon it, unless other persons have been led by such acts to believe the right abandoned, and to act upon the belief so that an assertion of the right will be to their injury. *Id.*

4. B. and P., being the owners of certain lands in the city of Buffalo, divided it into lots and caused a map to be made thereof, designating thereon G. street as sixty-three feet wide. They conveyed a lot by deed, under which defendant claims, in which the granted premises were described as commencing at the intersection of the exterior lines of G. and another street. B. and P. subsequently conveyed their interest in the soil of G. street, and this interest was conveyed to plaintiff. G. street, as laid out, was opened and used, but was, after such deed was executed, reduced by the common council of the city to a width of twenty-three feet, the center line remaining the same. Defendant took possession of and fenced in the portion of the street adjoining his inclosure up to the new line, claiming to own the fee. In an action of ejectment to recover the land between the old and new



street lines, *held*, that the soil of the street was not included in the grant under which defendant claimed, but the fee thereof was in the plaintiff; that the change of the exterior lines of the street did not change or affect defendants' boundary lines; that his grant, however, gave to him an easement in the premises in question, which easement was not extinguished by his inclosing the land and asserting a right to the fee; also, *held*, that the fact that defendant had taken exclusive possession did not entitle plaintiff to an unqualified judgment, but simply to judgment giving him possession subject to defendant's easement. *Id.*

- 5 Where A. grants to B. the right to enter upon his lands to construct a dam thereon near a point specified, and to take possession of such portion of the lands as may be necessary for that purpose, when the dam is located and built, the grant becomes as specific in respect to the land subject to the easement as if it had been particularly described in the grant; and neither grantor nor grantee can, without the consent of the other parties in interest, change the location of the dam. *Ex. L. St. J. Orphan Home v. Buf. H. Assn.* 561

— *Reserving rent in perpetuity, effect of default in payment of.*  
See EJECTMENT, 9.  
— *In trust.*  
See TRUSTS AND TRUSTEES, 11, 12.

### DEFENCES.

1. As to whether the fact that the Indian right of occupation of lands within this State had not been extinguished with the sanction of the State government or abandoned by the Indians, can be set up by one without title, as against the owner in fee subject to such rights, *quære.* *Howard v. Moot.* 262
2. Where a party, for a valuable consideration, gives to another an order payable out of a fund not

then in existence, such party cannot, by his own default, prevent the creation or realization of the fund and interpose the absence or failure of the fund as a defence to an action upon the order; so where an order is drawn upon a fund, to be paid upon the happening of a certain condition, which order is accepted, the acceptor cannot, by his own act, defeat the condition and then set it up as a defence in an action upon the acceptance. *Risley v. Smith.* 576

3. Mere inadequacy of consideration, except as a circumstance bearing upon the question of fraud or undue influence, is not a defence to a promissory note. *Earl v. Peck.* 596

— *Equitable in ejectment.*  
See EJECTMENT, 7.  
— *When fraud is a defence.*  
See FRAUD, 1.  
— *When fact that plaintiff was a trespasser, no defence in action against master for tortious act of servant.*  
See MASTER AND SERVANT, 7.  
— *In action on subscription to stock of railroad company, when defect in articles of association is not.*  
See RAILROAD CORPORATION, 7.

### DEFINITIONS.

— *"Borrower" under usury law.*  
See USURY, 9.

### DEMURRER.

See PLEADINGS, 1, 2.

### DEVISE.

— *To aliens.*  
See ALIENS, 1.  
WILLS, 2, 6.

### DIVORCE.

— *Judgment in action for, against wife necessary to deprive her of dower right.*  
See DOWER, 1.

## DOUGLAS (VILLAGE OF).

See MUNICIPAL CORPORATIONS, 2.

## DOWER.

1. Under the provisions of the Revised Statutes (2 R. S., 146, § 48), declaring that a wife convicted of adultery in an action brought against her by her husband for divorce, shall not be entitled to dower in his real estate, it is only where, upon proof and a finding or verdict of adultery, the court has, in such an action, given judgment of divorce against the wife and dissolved the marriage contract that her right of dower is lost; the forfeiture is not a consequence of the offence but of the judgment founded thereon. *Schiffer v. Pruden.* 47

2. Where, therefore, in an action of divorce *a vinculo* brought by a husband against his wife, the referee found the wife guilty of the adultery charged, but also found the husband guilty of the same offence, and thereupon a judgment was entered dismissing the complaint, *held*, that the wife had not lost her right of dower; that this possibility of dower affected the title to lands deeded by the husband, she not having joined in the deed or in any manner relinquished her right; and that a vendee who had contracted to purchase and pay for the premises upon delivery of a deed assuring to him the fee, clear of all incumbrances, was not required to accept such title. *Id.*

## DRAFT.

See BILLS, NOTES, CHECKS.  
ORDER.

## EASEMENTS.

1. An owner of an easement does not, by asserting a right to the fee of the servient estate, and by taking possession thereof, destroy

his right to the easement. No acts of such owner will extinguish his right, save those that indicate his intention to abandon it, unless other persons have been led by such acts to believe the right abandoned, and to act upon the belief so that an assertion of the right will be to their injury. *White's Bank of B. v. Nichols.* 65

2. Plaintiffs leased the first floor of a building in the city of New York for a store. In the rear was a yard attached to and exclusively appropriated for the use of the building, to which all the occupants had access through a hall running from the front to the rear of the building, and as the building was occupied when plaintiffs leased, no tenant could dispense with it. The rear of the store received light necessary for the transaction of business therein from windows opening into the yard. A door opened from the store into the yard and one into said hall. The lessor consented that plaintiffs might close up these two doors at his own expense to make shelf room. Defendants, having leased the whole premises, subject to plaintiffs' lease, began to excavate in the yard for the purpose of building thereon. In an action to restrain such building, *held*, that plaintiffs by their lease acquired an easement in the yard, of which they were not deprived by the agreement as to closing the doors; that even if it should be held from the fact of closing the doors, that it was not the intention by the lease to give them access to the yard, yet they were entitled to enjoy an easement therein for the purposes of light and air, and defendants could not change it to their disadvantage. *Doyle v. Lord.* 43?

3. The authorities establishing the American doctrine, so called, as to light and air, recognized and distinguished. *Id.*

4. Where A. grants to B. the right to enter upon his lands to construct a dam thereon near a point specified, and to take possession of such portion of the lands as may be

necessary for that purpose, when the dam is located and built, the grant becomes as specific in respect to the land subject to the easement as if it had been particularly described in the grant; and neither grantor nor grantee can, without the consent of the other parties in interest, change the location of the dam. *Ex. Orphan Home v. Buff. H. Assn.* 561

5. The estate and interest of a corporation in real property, although it may be but an easement, is subject to levy and sale on execution, as property distinguished from the franchise of the corporation. *Id.*

#### EJECTMENT.

1. A writ of possession issued upon a judgment in ejectment can lawfully be executed after the return day thereof; the office of the writ is simply to carry into effect the judgment and the command to return within sixty days is directory merely. *Witbeck v. Van Rensselaer.* 27
2. Although it is the duty of the sheriff, in executing such writ, if required, to remove from the premises the personal property thereon, the omission to do so does not vitiate the execution of the writ when possession of the land is delivered. *Id.*
3. Where the action was brought by a landlord because of non-payment of rent and possession is delivered to him or his assignee, the statute giving to the defendant six months after such taking possession in which to redeem (2 R. S., 506, § 33) begins to run, and the time limited for redemption is not enlarged by a subsequent re-entry of the tenant. *Id.*
4. B. and P., being the owners of certain land in the city of Buffalo, divided it into lots and caused a map to be made thereof, designating thereon G. street as sixty-three feet wide. They conveyed a lot by deed, under which defendant claims, in which the granted prem-

ises were described as commencing at the intersection of the exterior lines of G. and another street. B. and P. subsequently conveyed their interest in the soil of G. street, and this interest was conveyed to plaintiff. G. street, as laid out, was opened and used but was, after, such deed was executed, reduced by the common council of the city to a width of twenty-three feet, the center line remaining the same. Defendant took possession of and fenced in the portion of the street adjoining his inclosure up to the new line, claiming to own the fee. In an action of ejectment to recover the land between the old and new street lines, *held*, that the soil of the street was not included in the grant under which defendant claimed, but the fee thereof was in the plaintiff; that the change of the exterior lines of the street did not change or affect defendants' boundary lines; that his grant, however, gave to him an easement in the premises in question, which easement was not extinguished by his inclosing the land and asserting a right to the fee; also, *held*, that the fact that defendant had taken exclusive possession did not entitle plaintiff to an unqualified judgment, but simply to judgment giving him possession subject to defendant's easement. *White's Bank of B. v. Nichols.* 65

5. In an action of ejectment wherein the question was as to the location of a boundary line, it appeared that the adjoining owners for more than fifty years had occupied each on his side up to an old fence; that the fence had been kept up and maintained as a division fence for more than twenty years, each owner by agreement keeping up one-half. *Held*, that this was sufficient evidence of a practical location of and an acquiescence in the fence as the boundary line, and of a possession for more than twenty years in pursuance of such location to require the submission of that question to the jury. *Jones v. Smith.* 180
6. A plaintiff in ejectment must recover upon the strength of his own

title; he can take nothing by reason of any defects in that of the defendant. *Wallace v. Swinton*. 188

7. One F., in October, 1868, executed an instrument under seal, which, by its terms, conveyed to plaintiff certain real and personal estate, with power to sell and convey the lands "by retail for the best price that can be got," and, until such sale, to rent such of them as could be rented, and after defraying expenses and retaining five per cent for commissions, to pay over to F. the residue of the avails received during his life, and upon his death, after payment of his debts, to distribute the residue in the manner and to the persons specified. In December, 1870, F. executed to defendant R. a written contract for the sale to him of certain premises, part of the real estate included in said instrument, and R. went into possession under said contract. F. died in April, 1873. In an action to recover possession of the premises contracted to R., *held* (EARL, J., dissenting), that conceding plaintiff became seized under the instrument of an estate in the lands in trust for leasing with power of sale, as F. was entitled to receive to his own use all receipts from sales during his life, and as he could have compelled an execution of the trust by a sale, he having, instead of resorting to a court of equity for that purpose, made a sale, thus accomplishing the same result, R. not being in default, was in equity entitled to hold the premises as against plaintiff. *Heermans v. Robertson*. 332

8. In an action of ejectment, plaintiffs gave in evidence a judgment roll in a former action of ejectment brought by the grantor of plaintiffs' ancestor against defendant to recover the same lands wherein it was adjudged that said grantor was entitled to possession — *held*, that said roll was conclusive proof of the right of possession in said grantor; that the statutory right of redemption for six months after execution of writ of possession (2 R. S., 506, §§ 33, 34), did not vary its effect as evi-

dence in subsequent suits between the parties, or their privies, of what was adjudicated; and in the absence of proof, that the right so adjudicated did not still exist, plaintiffs, on proof that they had succeeded to that right, were entitled to a judgment for the recovery of possession. *Cagger v. Lansing*. 417

9. The complaint in the former action claimed a title in fee, alleging a grant in fee of the lands in question to defendant's grantor, with a charge upon them of a yearly rent in perpetuity to the grantor in said grant, his heirs and assigns, with clauses, that, in case of non-payment, the grantor might re-enter, have, repossess and enjoy the former estate and expel the grantee, and that the indenture should become void; it alleged non-payment, and notice to defendant of the intention of plaintiff to re-enter, in pursuance of the act of 1846 (chap. 274, Laws of 1846). The answer of defendant took issue upon these averments, and the referee found in favor of plaintiff. The referee did not find specifically what title plaintiff had in the premises, and in the judgment entered upon the report no mention was made of plaintiff's title, but simply an adjudication that plaintiff recover and have possession. Upon the evidence furnished by the judgment roll the court, in the second action, directed the jury to find a title in fee in the plaintiffs. *Held*, no error, that the interest in the rent, owned by the grantor, was an estate therein in fee simple; that, by the right of re-entry and avoidance of the lease or grant upon non-performance of the condition to pay rent, a conditional estate was constituted in the grantor, and a right to enforce it by action of ejectment; and that upon breach of the condition, the whole estate was at law cast upon the grantor, and he became re-vested with an estate in fee simple in the lands; also, that it was immaterial that the referee did not in terms express a conclusion of law to that effect, as it results necessarily from the facts found,

and the judgment was conclusive as to plaintiffs' title. *Id.*

10. The action of ejectment now tests not only the right to the possession but the title under which the right exists, whether in fee, for life, or for years. *Id.*

11. Some of the plaintiffs were infants; their father died intestate. *Held*, that their rights were enforceable by their mother as guardian in socage. *Id.*

12. Also, *held*, that plaintiffs being the holders of the legal title, were the proper parties to enforce it; and that the fact that they held it as security for a debt, the equitable title being in another, could not be interposed to defeat a recovery. *Id.*

13. One count of the complaint set forth the value of the use and occupation and claimed the same as damages. Upon the trial, evidence was given, without objection and uncontradicted, as to the value of the use and occupation. The court directed the jury to find the amount so proved for plaintiffs, "for withholding the possession of the premises." This was excepted to generally. It was urged upon appeal that testimony of the value of the use and occupation was not competent upon an issue as to the damages for withholding possession. *Held*, that the allegation in the complaint was a sufficient claim for *mesne* profits; and that no exception was taken below sufficient to present the objection. *Id.*

14. In the judgment the sum recovered was stated to be as damages for withholding possession. *Held*, that this was not an error reviewable upon exception, but an irregularity to be corrected on motion. *Id.*

#### ELECTIONS.

1. A board of county canvassers organized under the election laws of the State, although composed of town officers, do not meet as

such, or to perform duties relating exclusively to town or county matters, but meet as a distinct board for a special service (MILLER and EARL, JJ., dissenting). *Hankins v. The Mayor, etc.* 18

2. The provision of the act of 1869, providing for the support of the government of the city of New York (chap. 875, Laws of 1869), which requires the mayor and comptroller to designate newspapers in which to publish the proceedings of the board of supervisors and proceedings relating to county affairs, does not include proceedings of the board of canvassers for the city and county of New York, and there is no repugnancy between that provision and the statutory regulations for the publication of the proceedings of election boards (§ 11, title 5, chap. 130, Laws of 1842). (MILLER and EARL, JJ., dissenting.) *Id.*

3. Accordingly, *held* (MILLER and EARL, JJ., dissenting), that the power given to the boards of county canvassers to designate the papers in which the results of the elections shall be published, was not taken away from the board of canvassers of the city and county of New York by said provision of the act of 1869; and that other than the official papers having been designated, in 1870, by the board, the city corporation was liable for the expense of the publication. *Id.*

#### EMINENT DOMAIN.

1. Under the provision of the charter of the city of Buffalo (chap. 519, Laws of 1870), authorizing the city to take the fee of lands for corporate purposes, proceedings were instituted to take lands of a railroad company, in accordance with a resolution of the common council. Upon appeal from an order appointing commissioners, the General Term *held* that the court at Special Term "had no authority to inquire into any thing except the mere regularity of the proceedings and as to who

should be commissioners." *Held*, error; that a legal question was presented, *i. e.*, as to whether, under the grant of power contained in the charter, the city was authorized to appropriate the fee of lands held by a railroad company, also for public use, and acquired by the exercise of the right of eminent domain, which question the court hearing the application necessarily had the power to decide. *In re City of Buffalo.* 547

2. As to whether the charter confers the power to make such an appropriation, *quære.* *Id.*

### EQUITY.

1. A suit in equity to rescind an agreement for the sale of real estate because of defect in title or want of power in the vendor to sell cannot be maintained, as the party has a perfect defence to any action brought against him to enforce the contract. *Bruner v. Meigs.* 506
2. If a craft of any kind is adapted for use in any employment for which a canal may lawfully be used, and is actually employed in a business lawful in itself, and does not in the conduct of such business unreasonably or unnecessarily obstruct the navigation of the canal by other vessels, a court of equity will not forbid the use of the craft in such employment; and this, although some obstruction to the free passage of vessels necessarily results from the peculiar employment. *People v. Horton.* 610
3. It is not the province of a court of equity to proscribe one branch of a business in which a party is engaged, while permitting every other branch of the same business to be carried on in the same locality and with the same instrumentalities. *Id.*

— *Equitable defence in ejectment.*  
See EJECTMENT, 7.

### ERROR (WRIT OF).

— *When point not taken below cannot be taken on.*

See CRIMINAL TRIAL, 1.

### ESTOPPEL.

A municipal corporation is not estopped from asserting the invalidity of its bonds, by any conduct of its officers or agents, or by acts of acquiescence and approval on the part of the inhabitants of the municipality, after knowledge of the facts. *Weismer v. Village of D.* 91

— *When party estopped from asserting a defect not set up in return to writ of mandamus.*

See MANDAMUS, 1.

### EVIDENCE.

1. Rules of evidence are at all times subject to modification and control by the legislature, and changes thus made may be made applicable to existing causes of action. *Howard v. Moot.* 262
2. An act declaring any circumstance or any evidence, however slight, *prima facie* proof of a fact is valid. *Id.*
3. Accordingly *held*, that the act to perpetuate certain testimony respecting the title to the Pulteney estate (chap. 19, Laws of 1821), was constitutional and valid. *Id.*
4. Also *held*, that the legislature having thereby made the chancellor the final arbiter to determine what would be good *prima facie* evidence of the facts stated, evidence taken in due form, as prescribed by the act, accompanied by the opinion of the chancellor, properly given and certified, to the effect that it was good *prima facie* evidence of the facts stated was, although the evidence was hearsay, competent and conclusive in the absence of any evidence to controvert it. *Id.*



5. This court will take judicial notice of the fact that the tract of land known as the "Pulteney estate" was ceded by the State of New York to the State of Massachusetts by the treaty and deed of cession executed December 16, 1786, and that under the proper authority, State and national, the Indian title to said lands has been extinguished. *Id.*
6. A memorandum relating to the terms of a parol contract, made at the time by one of the parties negotiating the contract, and read over to the others, although not itself a valid contract, is competent as evidence to corroborate the oral evidence as to the terms of the contract; the memorandum does not make the oral evidence incompetent. *Lathrop v. Bramhall.* 365
7. In an action against an innkeeper for the loss by fire of goods of a guest in an outbuilding, the defence was that the fire was of incendiary origin. The question as to the origin of the fire was contested. Defendant offered to show that on the night of the fire an attempt was made to fire another building, a short distance from the barn of defendant, by the use of similar means to those which defendant's evidence tended to show were used in firing said barn. This evidence was objected to, and objection sustained. *Held*, error; that the evidence was competent as bearing upon the question of the origin of the fire. *Faucett v. Nichols.* 377
8. Where exemplary or punitive damages are claimed in an action, all the circumstances immediately connected with the transaction, tending to exhibit and explain the motive of defendant as to show upon the one side that he acted maliciously, or upon the other that he acted in the honest belief that he was justified in what he did, or acted under the impulse of sudden passion or alarm caused by plaintiff's conduct, are admissible in evidence. *Voltz v. Blackmar.* 440
9. It is competent under the Code for one of two makers of a promissory note, in an action upon the note, to prove by parol that he signed the note as surety, to enable him to interpose as a defence that he was discharged by an extension of time given to the principal with knowledge of the suretyship. *Hubbard v. Gurney.* 457
10. Such evidence does not alter or vary the written contract, as the fact proved simply operates, when knowledge of it is brought home to the creditor, to prevent him from changing the contract or making a different one with the principal debtor without the consent of the surety, or from impairing the rights of the latter by releasing any security or omitting to enforce the contract when requested. *Id.*
11. The authorities upon the question as to the competency and effect of such evidence collated and discussed. *Id.*
12. Plaintiff's complaint alleged, in substance, that certain bonds belonging to the estate of S., of whose will he was surviving executor, came into defendant's hands as the personal representative of M., a deceased executor, which they refused to deliver up unless plaintiff would pay an unjust claim for commissions, which was disputed by plaintiff, but which he paid in order to obtain the bonds. Defendant's answer alleged, among other things, that an account containing charges for the commissions claimed was delivered to plaintiff at his request, examined by him and admitted to be correct. This allegation, after plaintiff had given evidence that he had always disputed the claim, defendants offered to prove on trial. The offer was rejected. *Held*, error; that the averment in the complaint that the claim was unjust and was disputed was necessary in order to show that the payment was involuntary; and it being put in issue, defendant was entitled to the evidence offered

as relevant to that issue. *Scholey v. Mumford*. 521

13. In an action to recover for services rendered to a boarder sick with cancer, evidence on the part of plaintiff was received, under objection, that the health of his wife was injured by the stench of the cancer. *Held*, no error; that the evidence was competent, not to lay a foundation for recovery for the loss of health, but to show the nature of the services. *Reynolds v. Robinson*. 589

14. Physicians who knew the value of services in nursing cancer cases, and who were acquainted with the case, were permitted to give their opinion as to the value of the services in dressing the cancer and caring for the sick person. *Held*, no error. *Id.*

15. A physician, who had testified to his knowledge of cancer cases and of the value of services in caring for them, who also testified to having heard the evidence of other physicians who had treated and who described the cancer, and had heard the testimony of plaintiff's wife read, but who had no personal knowledge of the case, was asked: "What would be the value of the services rendered by her in nursing and dressing the cancer?" This was objected to, and the answer received under exception. *Held*, error; as the question called upon the witness to assume the correctness of, and to draw inferences from, the evidence of other witnesses; that his opinion should have been obtained by stating to him an hypothetical case. *Id.*

— *Of custom, when proper.*

*See* ASSESSMENT AND TAXATION, 3.

— *Entries as, when proper.*

*See* ASSESSMENT AND TAXATION, 4.

— *Competent as part of res gestæ and when relevant.*

*See* NUISANCE, 4.

*See Marks v. King*. (Mem.) 628

— *Of fraud, when improper under pleadings.*

*See* PARTNERSHIP, 5.

— *Parol, proper to establish that real estate deeded to one partner was purchased for benefit of firm.*

*See* PARTNERSHIP, 9, 10, 13, 17.

— *Entries on firm books competent against partner.*

*See* PARTNERSHIP, 15.

— *Of grantor, competency of, to show that agent took deed in his own name in violation of his duty, also as part of res gestæ.*

*See Roulston v. Roulston*. (Mem.) 652

## EXCEPTION.

— *Sufficiency of, to raise question on appeal.*

*See* EJECTMENT, 13.

## EXECUTION.

1. An execution against real property, issued after the death of the judgment debtor, is absolutely void as against those having in their hand any portion of the real estate of the deceased affected by the judgment who have not been made parties to proceedings authorized by the law to revive the judgment against said estate. *Wallace v. Swinton*. 188
2. It is essential to the validity of such an execution that its issuing be authorized by judgment in proceedings, under section 376 of the Code for the enforcement of the judgment. *Id.*
3. It is not optional with the judgment creditor to proceed under that section or under section 284; the latter is only applicable where there has been a delay for five years in issuing execution, and the judgment debtor is still living. *Id.*
4. Said section 376 is not repealed or affected by the act of 1850 (chap. 295, Laws of 1850) making the leave of the surrogate necessary to the issuing of an execution after death of the judgment debtor; this is simply an additional requirement. *Id.*
5. As to whether heirs, devisees or terre-ténants can avail themselves of irregularities in proceedings before the surrogate to defeat a title to real property acquired un-



der a sale by virtue of an execution authorized to be issued by the surrogate, *quære*. *Id.*

6. The estate and interest of a corporation in real property, although it may be but an easement, is subject to levy and sale on execution, as property distinguished from the franchise of the corporation. *Evo. Orphan Home v. Buff. H. Assn.* 562

### EXPERTS.

— *Testimony of, when incompetent.*

See EVIDENCE, 13, 14.

### FALSE IMPRISONMENT.

In an action for assault and false imprisonment, it appeared that plaintiff was the confidential clerk and agent of defendant, having charge of his business in New York, with power of attorney authorizing him to sign and indorse checks, notes, etc. After receiving notice that his services were not required for another year, he, without defendant's knowledge, drew from the bank \$4,000, on a check signed by him in defendant's name and deposited the same, receiving a certificate of deposit payable to his own order. Defendant was indebted to plaintiff at the time about \$3,800, and, as the latter alleged, he drew the check to pay the sum owing him. On being advised of this, defendant went to his office in New York and demanded the money, and upon plaintiff's refusal to restore it, discharged him. Plaintiff thereupon took from the safe the certificate of deposit and certain negotiable warehouse receipts belonging to defendant, and, without the knowledge of the latter, carried them away. Defendant, being advised of the fact, sent for an officer, and on plaintiff's return and refusal to surrender the papers, the arrest complained of was made. The court was requested to charge the jury that there was no justification for plaintiff's pos-

session of the warehouse receipt, to which the court responded: "The private rights of these parties are not before the jury." *Held*, error; that the charge requested should have been given, and the proposition stated was erroneous; that the facts were proper to be taken into consideration as bearing upon defendant's motive. *Voltz v. Blackmar.* 440

### FINDINGS OF LAW AND FACT.

*It seems*, that if, in an action for negligence, tried by a referee, an express finding of fact that defendant was guilty of negligence is necessary to uphold a judgment, a finding to that effect, although included in the conclusions of law, is sufficient. *Sherman v. H. R. R. Co.* 254

— *When omission to find conclusion of law, resulting necessarily from facts found, immaterial.*

See EJECTMENT, 9.

— *Construction of findings.*

See INSURANCE (FIRE), 2.

### FIRES.

— *Investigation as to origin.*

See N. Y. (CITY OF), 3, 4.

### FORECLOSURE.

1. One asserting a right under a mortgagor prior to the mortgage, is a proper party to an action for foreclosure of the mortgage and the question of priority is proper to be determined in the action. *Brown v. Volkening.* 76
2. Where the owner of a mortgage has pledged the same as collateral security for a debt less than the face of the mortgage, he has an interest in the same which entitles him to bring an action for the foreclosure of the mortgage. In such action the pledgee is a necessary party, but it is immaterial as far as the mortgagor or

other parties in interest are concerned whether he is made a plaintiff or defendant. *Simson v. Satterlee*. 657

See CHATTEL MORTGAGE, 2, 3.

#### FOREIGN LAW.

— *Law of another State to be learned only as a fact from evidence.*

See *Hull v. Mitcheson*. (Mem.) 689

#### FORMER ADJUDICATION.

— *In action of ejectment, effect of.*  
See EJECTMENT, 8, 9.

#### FORWARDERS.

Plaintiffs were forwarding merchants at T., and were employed by defendant to ship certain marble to him at P. The marble was shipped on board a canal boat which proceeded on the way as far as A. Learning that it was there delayed, one of the plaintiffs went to A. and there learned that the only tow-boat company it was practicable to employ to tow the boat down the H. river declined to take the boat unless the captain would pay an old bill, and would pay in advance the charge for towing. The captain had gone home to procure the money. Plaintiffs thereupon advanced the money and the boat was put into a tow, and by the negligence or unskillfulness of the employes of the tow-boat company was injured and sunk. In an action to recover for advances and charges, wherein the loss was set up as a counterclaim, *held*, that plaintiffs acted simply as forwarders, not as carriers; that by the transactions at A., they did not assume the carriage of the property; that they had a right, and it was their duty to pay the advance charges, and although defendant was not liable for the advance on the account of the captain, it was for his benefit, and he could not complain; and that as the loss did not occur by

any negligence on the part of plaintiffs, and was not a natural or ordinary consequence of any act of theirs, they were not liable therefor. *Stannard v. Prince*. 800

#### FRAUD.

In an action upon a policy of life insurance defendant set up as a defence and proved that after the policy had been forfeited by reason of non-payment of premiums defendant was induced by false representations on the part of plaintiff (the assured) as to the health of the insured to receive the back premiums and to revive the policy. The insured died within a week thereafter. Defendant served an offer to allow judgment for the back premiums so received with interest and costs. The court directed a verdict for plaintiff on the ground that it was the duty of defendant, on discovery of the fraud, to have returned, or offered to return, the back premiums and to disaffirm the new contract; and not having done so the fraud was no defence. *Held*, error; that conceding the rule stated to be applicable to the case, it was substantially complied with by the offer of judgment; that defendant was not bound to make the offer before a claim was presented; and as the action was brought soon after the time allowed by the policy for the payment of the claim had elapsed, that the offer was made with sufficient and reasonable promptness; also that it was no answer that the offer not having been accepted within the time prescribed was to be deemed withdrawn, as the non-acceptance was the fault of the plaintiff. *Harris v. E. L. A. Society*. 196

— *When allegation of, insufficient to allow proof.*

See PARTNERSHIP, 5.

#### FRAUDS (STATUTE OF).

See STATUTE OF FRAUDS.

GENERAL TERM.

A General Term has no power to review a case upon the facts on appeal from the judgment where the trial was by jury; the only mode in which the facts can be brought before it for review, is by appeal from order of Special Term or Circuit granting or refusing a new trial. *Boos v. W. M. L. Ins. Co.* 236

GOOD-WILL.

1. Where A. sells out the stock and good-will of a retail business to B., covenanting not to engage in, or carry on, the same business within certain limits, it is not necessary, in order to establish a breach of the covenant, to show that A. has solicited custom within the prescribed limits; if he, having established himself in the same business outside of the district, systematically and for profit, to an extent to constitute the carrying on of a business, sends to the houses of customers within the district, receives orders and delivers goods, this is a breach of the covenant, although it be done at the request of the customers and without his solicitation. *Sander v. Hoffman.* 248
2. If, occasionally, to oblige an old customer, A. sells to him goods, this is not a breach. *Id.*

GRAND JURY.

A challenge to the array of a grand jury cannot be allowed. (2 R. S., 724, §§ 27, 28.) *Carpenter v. The People.* 483

— *Alleged irregularities of drawing of, in New York city, when not ground for plea in abatement to indictment.*

See INDICTMENT, 5, 6, 7.

GUARDIAN AND WARD.

— *Right of infant when enforceable by mother as guardian in socage.*  
See EJECTMENT, 11.

— *Rights of mother as guardian in socage.*

See *Roulston v. Roulston.* (Mem.) 652

HABEAS CORPUS.

An order quashing a writ of *habeas corpus* can only be reviewed upon appeal. A writ of error will not lie in such case. *People ex rel. v. Conner.* 481

HIGHWAYS.

1. Although a highway crossing a railroad track has been regularly laid out, yet until it has been actually opened or notice "of such laying out" has been served upon an officer of the railroad corporation named in and as required by the act of 1853 (chap. 62, Laws of 1853), the duty imposed by the general railroad act, as amended in 1854 (§ 7, chap. 282, Laws of 1854), of ringing a bell or sounding a whistle upon a train approaching the crossing, does not attach; the highway is not "a traveled public road or street" within the meaning of said last-mentioned act. *Cordell v. N. Y. C. and H. R. R. Co.* 535
2. Slight inconveniences and occasional interruptions in the use of a highway or navigable stream, which are temporary and reasonable, are not illegal merely because the public may not, for the time, have the full use of the highway or stream. *People v. Horton.* 610

— *Borrowing money by towns for building roads and bridges.*

See TOWN BONDING, 1, 2, 3, 4, 5.

HOTEL KEEPER

See INNKEEPER.

HUSBAND AND WIFE.

1. Under the provisions of the Revised Statutes (2 R. S., 146, § 48), declaring that a wife convicted of adultery in an action brought against her by her husband for

- divorce, shall not be entitled to dower in his real estate, it is only where, upon proof and a finding or verdict of adultery, the court has, in such an action, given judgment of divorce against the wife and dissolved the marriage contract that her right of dower is lost; the forfeiture is not a consequence of the offence, but of the judgment founded thereon. *Schiffer v. Pruden.* 47
2. Where, therefore, in an action of divorce *a vinculo* brought by a husband against his wife, the referee found the wife guilty of the adultery charged, but also found the husband guilty of the same offence, and thereupon a judgment was entered dismissing the complaint, *held*, that the wife had not lost her right of dower; that this possibility of dower affected the title to lands deeded by the husband, she not having joined in the deed or in any manner relinquished her right; and that a vendee who had contracted to purchase and pay for the premises upon delivery of a deed assuring to him the fee, clear of all incumbrances, was not required to accept such title. *Id.*
3. The fact that the wife of A. owns the fee of the land on which stands the house in which he lives with his family, is not necessarily inconsistent with his having such a possession of the house as will entitle him to maintain an action against a trespasser for forcibly entering it. *Alexander v. Hard.* 228
4. Plaintiff built a house upon the land of his wife, in which he lived with his family, having possession and control thereof. He operated the farm in his own name, owned the stock and provided for his family. In an action for unlawfully and violently breaking into and entering the dwelling-house the court charged that plaintiff could not recover for damages to the house. *Held*, error; that the facts were sufficient to authorize a finding of a possession in plaintiff sufficient to entitle him to maintain the action. *Id.*
5. Where a married man takes boarders into his house, or converts it into a hospital for the sick, and his wife takes charge of his establishment or renders services in the house to boarders or sick persons, in the absence of proof of any special agreement, all her services and earnings belong to her husband, and he can maintain an action to recover therefor. *Reynolds v. Robinson.* 589
6. In an action to recover for services rendered to a boarder sick with cancer, evidence on the part of plaintiff was received, under objection, that the health of his wife was injured by the stench of the cancer. *Held*, no error; that the evidence was competent, not to lay a foundation for recovery for the loss of health, but to show the nature of the services. *Id.*

## INDEMNITY.

Where a promissory note is lost and an action is brought thereon, the defendant is entitled to the indemnity provided by statute (2 R. S., 406, § 75) in actions upon lost negotiable instruments; and this, although it appears that the note has not been indorsed; indemnity must be given without regard to the fact of actual negotiation. *Frank v. Wessels.* 153

## INDIANS.

1. This court will take judicial notice of the fact that the tract of land known as the "Pulteney estate" was ceded by the State of New York to the State of Massachusetts by the treaty and deed of cession executed December 16, 1786, and that under the proper authority, State and national, the Indian title to said lands has been extinguished. *Howard v. Moot.* 262
2. As to whether the fact that the Indian right of occupation of lands within this State had not been extinguished with the sanction of

the State government or abandoned by the Indians, can be set up by one without title, as against the owner in fee subject to such rights, *quære*. *Id.*

3. All the terms and conditions of the said treaty, upon which depended the right of Massachusetts and her grantees to an absolute and indefeasible estate in the lands granted, *held*, to have been substantially performed. *Id.*

### INDICTMENT.

1. In an indictment for perjury alleged to have been committed on an investigation before the fire marshal of New York city, it was alleged that the accused swore there were 60,000 cigars in the building at the time of the fire. The proof was that he swore there were 65,000 cigars. This was one of various items of property as to which the accused was charged with having sworn falsely. On error it was objected that there was a fatal variance between the indictment and the proof. The objection was not taken on the trial. *Held*, that it was not available here, as if made upon the trial, the evidence as to this item could have been excluded or waived, and the jury directed to disregard it, and the conviction could have been sustained upon the proof as to the other items. Also, *held*, that the variance was not material. *Harris v. The People*. 148

2. When an indictment charges that the accused has sworn falsely as to several facts, it is not necessary to prove all that is charged. It is sufficient to prove enough to make out the offence. *Id.*

3. There were two counts in the indictment, the first charging perjury in the oral testimony given before the fire marshal, and the other perjury in swearing to an affidavit before the same officer, containing in substance the same matters as testified to orally. The jury found the prisoner not guilty

under the first count and guilty under the second. It was claimed that the verdict was inconsistent. It appeared that a portion of the oral testimony was taken when the fire marshal was not present. *Held*, that the objection was untenable, as the jury may have found that the oral testimony alleged to be false was not taken before the marshal. *Id.*

4. A plea in abatement to an indictment is to be strictly construed; it must be drawn with precision and accuracy and must be certain to every intent. *Dolan v. The People*. 485

5. A plea in abatement to an indictment found at a Court of General Sessions in the city of New York alleging that the annual grand jury list was not wholly selected, as required by statute (chap. 498, Laws of 1853), from the petit jury lists made out by the commissioner of jurors, without any averments of fraud or design, is not good. The fact that a few names not appearing on the petit jury lists are accidentally put upon the grand jury list does not vitiate the whole list, and that it was by accident or oversight is to be presumed in the absence of allegations of fraud or design. *Id.*

6. Nor is it a good plea that some one of the fifty selected as the special panel of grand jurors (§ 28, chap. 539, Laws of 1870) was not upon the petit jury lists, in the absence of an allegation that the persons actually sworn and impaneled were not upon that list. It is necessary also in such a plea to give the names of the persons alleged to have been selected and drawn who were not upon the petit jury lists. *Id.*

7. It is not a good plea that the commissioner of jurors was prevented by duress from attending upon or supervising the grand jury. In the absence of allegations as to how the grand jury was drawn and by whom, it is to be presumed that the drawing was made by some other person claiming the office, acting as *de facto* commis-

sioner, and recognized as such by all the officers having relations with him or his work; and a jury drawn by a *de facto* commissioner is regular. *Id.*

8. An indictment setting forth a felony and then charging the killing of another by the accused while engaged in the commission thereof, is not void for duplicity. It charges but one offence, that of murder in the first degree, within one of the definitions of that offence in the act of 1873 (chapter 644, Laws of 1873), *i. e.*, the killing by a person while engaged in the commission of a felony. *Id.*

9. Where one breaks into a dwelling-house burglariously with intent to steal, he is engaged in the commission of the crime until he leaves the building with his plunder; and if, while engaged in any of the acts immediately connected with his crime, he kills a person resisting him he is guilty of murder under said statute. *Id.*

10. It is not necessary in an indictment charging the crime of murder under said provision to allege that the killing was "without any design to effect death;" an allegation that it was willful and felonious is proper and sufficient. The object of the words quoted is to dispense with proof of a design to effect death, not to require proof that there was no such design. *Id.*

#### INJUNCTION.

1. An order of reference, under section 222 of the Code, to ascertain damages upon an undertaking given upon the granting of an injunction, cannot be regularly granted until judgment has been entered; but where the order is entered by plaintiff's consent this obviates the objection. *Lawton v. Green.* 326

2. The limit of liability upon such an undertaking is the amount specified therein, and the court has no power to make any allow-

ance beyond that amount for disbursements. Referee fees upon the reference are part of the damages, and recoverable as such. *Id.*

3. Accordingly, *held*, that an allowance for disbursements and referee fees over and above the sum specified in the undertaking was error. *Id.*

4. Such a proceeding is not a proceeding "in the action;" it is a proceeding after judgment, constituting no part of the action, and the court has no power to give costs therein. *Id.*

5. The final order in such proceedings should be limited to fixing the amount of damages, and a provision therein requiring the plaintiff to pay the same is improper. The amount of damages so ascertained is conclusive upon the parties and the sureties, but payment can only be enforced by action upon the undertaking. *Id.*

6. If a craft of any kind is adapted for use in any employment for which a canal may lawfully be used, and is actually employed in a business lawful in itself, and does not in the conduct of such business unreasonably or unnecessarily obstruct the navigation of the canal by other vessels, a court of equity will not forbid the use of the craft in such employment; and this, although some obstruction to the free passage of vessels necessarily results from the peculiar employment. *Horton v. People.* 610

7. It is not the province of a court of equity to proscribe one branch of a business in which a party is engaged, while permitting every other branch of the same business to be carried on in the same locality and with the same instrumentalities. *Id.*

8. Defendants were the owners of a floating elevator, which was used by them in the "Buffalo City Ship canal" (an artificial channel, forming part of the harbor of that city), for the purpose of transferring grain in bulk from



lake vessels to canal boats, moving from place to place as required. When not in use it was moored opposite lands owned by defendants. The channel of the canal is 160 feet wide. When employed in unloading a vessel, with the vessel on one side and a canal boat on the other, the three crafts occupy less than eighty feet of the channel, and a transfer of the load of a vessel is made in a few hours. Vessels moving in the canal are moved by steam power. In an action by the attorney-general in behalf of the people, a judgment was rendered restraining such use, but allowing the use of the elevator for unloading vessels aground or for any other purpose. *Held*, error; that the use was not an unnecessary, unreasonable and unlawful use of the canal, or an unreasonable and unlawful obstruction to trade and commerce, but was in aid of commerce. *Id.*

9. It is not an excuse for the violation of an injunction that the order is more extensive in its restraints than the prayer of the complaint; the order, if irregular, is not void, and while it is in force it is the duty of the defendant to obey it. *Mayor, etc., v. N. Y. and S. I. F. Co.* 622

10. Corporations may be restrained by injunction, and may be fined for violating the injunction. *Id.*

11. Where, upon motion to punish a party for contempt in violating an injunction, there is legal evidence sufficient to call for the exercise of the judgment and discretion of the court, its decision is not reviewable here. *Id.*

12. A party, bound to obey an injunction, may be guilty of a violation thereof as well as aiding, abetting and countenancing others in violating it as by doing it directly; such orders must be honestly and fairly obeyed. *Id.*

18. Where proceedings to punish a party for contempt, in violating an injunction, are commenced by an order to show cause, interro-

gatories need not be filed prior to a final adjudication upon the alleged contempt. *Id.*

— *To restrain proceedings by mandamus, when improper.*

*See CANALS, 1, 2.*

— *When action to restrain party from building up to line of street cannot be maintained.*

*See CONTRACTS, 1.*

— *To restrain making new contract by State officer, when not proper.*

*See CONTRACTS, 6.*

## INNKEEPER.

1. Under the provisions of the innkeepers' act of 1866 (chapter 658, Laws of 1866), exempting an innkeeper from liability for the loss by fire of property of a guest in a barn or outbuilding, where it shall appear that the loss was the work of an incendiary, and occurred without negligence on his part, the burden is upon the innkeeper to show that the fire was an incendiary one, and to show absence of negligence on his part. *Faucett v. Nichols.* 877

2. In an action to recover for such a loss, evidence was given tending to show that the fire was the work of an incendiary, who gained access to the hay loft, where the fire was set, through a window opening into an alley. The window was left open and lumber was piled against the barn so that a person could easily climb upon it and enter the window. The court submitted to the jury the question whether leaving the window open was negligence, charging that if so, and it contributed to occasion an incendiary firing, defendant was liable. *Held*, no error; that the facts proved, although not strong, were some evidence of negligence sufficient to authorize the submission of the question to the jury; and that the negligent omission by an innkeeper to take reasonable and prudent precaution to guard against an incendiary fire was such negligence as would deprive him of the benefit of the act. *Id.*

3. Negligence, which precedes and facilitates the commission of the crime, is as much within the statute as the negligent omission to protect and remove the property after discovery of the fire. *Id.*
4. The question as to whether the fire was of incendiary origin was contested. Defendant offered to show that on the night of the fire an attempt was made to fire another building, a short distance from the barn of defendant, by the use of similar means to those which defendant's evidence tended to show were used in firing said barn. This evidence was objected to, and objection sustained. *Held*, error; that the evidence was competent as bearing upon the question of the origin of the fire. *Id.*

#### INSURANCE DEPARTMENT.

1. By the act of 1875 (chap. 837, Laws of 1875), providing for the distribution of the property and effects of the Eclectic Life Insurance Company no authority is given to the court to direct the superintendent of the insurance department to transfer to the receiver of said company for the purposes of distribution, the securities, etc., belonging to said company, deposited with him for the protection of policyholders; it was the intent of the act, upon an order being obtained in the manner prescribed therein, to require such distribution to be made by the superintendent himself. *People ex rel. Ruggles v. Chapman.* 557
2. Accordingly, *held*, that an order directing the issuing a writ of mandamus requiring said superintendent to assign and deliver to the receiver the securities, money and property of said company in his hands, was improperly granted. *Id.*

#### INSURANCE (FIRE).

1. An insurance broker employed by a party to effect insurance for him

may be regarded by the insurer as clothed with full authority to act for his principal in procuring, modifying or canceling policies; and his acts in these respects are binding upon his principal. *S. O. Co. v. T. I. Co.* 85

2. In an action upon a policy of fire insurance defendant claimed and proved that the policy was surrendered to defendant for cancellation and was canceled before the loss. Plaintiff claimed that such surrender was by mistake. The court, before whom the action was tried, did not find as a fact the mistake claimed, but in the conclusions of law, held that the return of the policy indorsed for cancellation, although by mistake, would defeat the action. Upon settlement of the case plaintiff's counsel requested the judge to find the mistake; this he refused to do. The evidence as to the mistake was not conclusive. *Held*, that upon the report itself the conclusion of law could not be disturbed as it could not be determined therefrom that the court would have found a mistake; that the subsequent refusal so to find was equivalent to a finding against the fact; but if regarded as a refusal to find either way the remedy of the party was by motion to compel a finding. *Id.*
3. The policy was obtained by a broker employed by plaintiff. It contained a clause giving defendant power to raise the rate of insurance. Defendant's agent notified the broker that it would raise the rate one per cent. The broker assented and agreed to bring the policy to have it indorsed thereon; this he did not do. Defendant was allowed to prove, under objection, the custom among brokers in the city to consider the matter concluded, unless such indorsement was made, allowing a reasonable time to bring the policy for that purpose. *Held*, no error. *Id.*
4. Defendant was permitted to show entries upon the broker's book showing the cancellation of the policy. These were objected to unless evidence was given show-



ing that plaintiff had knowledge of them. The objection was overruled. *Held*, no error; that the evidence was competent as bearing upon the question of mistake and upon the credibility of the broker and his clerks, who were witnesses for plaintiff. *Id.*

5. Defendant issued to plaintiff a policy of fire insurance containing a clause requiring the assured in case of loss to furnish proof thereof within thirty days. A loss having occurred, plaintiff failed to furnish the required proof. An adjuster of defendant within the thirty days visited the premises and made inquiries into the circumstances of the fire. This was without authority from defendant and without the knowledge of plaintiff. Upon receipt of proof of loss some four months after the fire, defendant sent a letter to plaintiff's attorney stating that the proof of loss was too late; also, that after careful examination they were satisfied the case was fraudulent, and therefore rejected the claim. In an action upon the policy, *held*, that a refusal of the court to nonsuit plaintiff was error; that proof of loss within the time prescribed was necessary unless waived; and that there was no evidence of a waiver. *Blossom v. L. F. Ins. Co.* 162

6. As to whether the omission of an insurer to raise the objection of a non-compliance with such a condition upon being furnished with proof long after the expiration of the time specified, can be deemed a waiver, *quære*. *Id.*

7. In an action to reform a policy of fire insurance upon a dwelling-house, the alleged mistake was that an adjoining building was intended to be insured instead of the dwelling described. It appeared that the applicant had owned both buildings and had lived in the one described; that defendant's agent had insured the furniture therein; that he had insured the building claimed to have been intended and the policy was then outstanding. He had the description of both buildings upon his books. The

applicant had removed from the dwelling to the adjoining building, which was occupied as a dwelling and paint shop, and did not, in fact, own the former. The agent, however, testified that he supposed that he did. The premium upon the dwelling was one and one-half per cent; upon the building it was two and one-half. The application was, by letter for a policy on "my house." The agent, thereupon, made out the policy in question upon the dwelling, charging one and one-half per cent. The building was burned. The only direct evidence to establish that defendant intended to insure the building was that of the agent who, in answer to the question, "To what property *do* you understand this letter \* \* \* referred?" answered, to the property burned. Upon his cross-examination he testified, in substance, that at the time and before the policy was issued he was in doubt, but his idea was it was on the dwelling and he so made out the policy. *Held*, that the facts did not show an intent, on the part of defendant, to insure the building burned, and did not justify a reformation of the policy. *Mead v. W. F. Ins. Co.* 453

8. A policy of fire insurance contained a condition requiring proofs of loss to be furnished by the insured within twenty days. It also contained a clause, in substance, that nothing save an agreement in writing, signed by an officer of the company, should be considered as a waiver of any condition or restriction in the policy. In an action upon the policy, *held*, that a local agent had no authority to waive such condition. *Van Allen v. F. J. S. Ins. Co.* 469

#### INSURANCE (LIFE).

1. In an action upon a policy of life insurance defendant set up as a defence and proved that after the policy had been forfeited by reason of non-payment of premiums defendant was induced by false representations on the part of plaintiff (the assured) as to the

health of the insured to receive the back premiums and to revive the policy. The insured died within a week thereafter. Defendant served an offer to allow judgment for the back premiums so received with interest and costs. The court directed a verdict for plaintiff on the ground that it was the duty of defendant, on discovery of the fraud, to have returned, or offered to return, the back premiums and to disaffirm the new contract; and not having done so the fraud was no defence. *Held*, error; that conceding the rule stated to be applicable to the case, it was substantially complied with by the offer of judgment; that defendant was not bound to make the offer before a claim was presented; and as the action was brought soon after the time allowed by the policy for the payment of the claim had elapsed, that the offer was made with sufficient and reasonable promptness; also that it was no answer that the offer not having been accepted within the time prescribed was to be deemed withdrawn, as the non-acceptance was the fault of the plaintiff. *Harris v. E. L. A. S.* 196

2. In an action upon a policy of life insurance the defence was the falsity of various answers to questions in the application which were, by the terms of the policy, made warranties. After the defendant's counsel had, upon the trial, specified certain answers which he claimed to be false, on motion to dismiss, in exceptions to the submission of questions to the jury and in requests to charge, he requested the court to charge that upon the policy and the evidence the plaintiff could not recover any thing beyond the amount of the last premium. *Held*, that the general objection did not entitle defendant to raise on appeal points as to the falsity of answers which were not specified, and as to which no question of law was raised and passed upon on the trial. *Boos v. W. M. L. Ins. Co.* 236

8. In answer to a question as to whether he had had, during the last

seven years any severe sickness or disease, the insured answered "No." The policy was issued in 1870. Evidence was given showing that in 1865, the insured had an attack of pneumonia which lasted ten days, during which he was attended by a physician. Plaintiff's witnesses testified that during this time he was a strong, healthy man. One witness, not shown to be competent to speak as to the nature of the illness, testified that plaintiff had sunstroke in 1863, or 1865. *Held*, that the court was not bound to decide, as matter of law, that either was "a severe sickness or disease" within the meaning of the question, and that the question of a breach of warranty was one of fact for the jury. *Id.*

4. A policy of life insurance contained a clause avoiding it in case the insured should visit any part of the United States lying south of a specified line, between the first of July and the first of September, without a written permit. He had a permit authorizing him to go and remain south until July 1, 1870. He remained until he died, March 18, 1872. In an action upon the policy, it appeared that the health of the deceased, in the summer of 1870, was very poor, so that he could only ride out in a buggy to his plantation and back, and was never any better. It was not proved that he was too unwell to return, or that he made any effort to do so. *Held*, (1) that if inability was an excuse and a failure to return in consequence would not have been a breach of the condition, the facts did not sustain the claim, as it did not appear that the insured was, prior to July first so unwell as to render it impossible for him to return by any of the usual modes of travel; (2) that inability was not an excuse, as when the insured went south he took the chances of his being able to return. *Evans v. U. S. L. Ins. Co.* 304
5. On the day the annual premium became due in 1870, an agent of the owner of the policy called at defendant's office to pay it. De-

fendant declined to receive it because the insured was residing south, unless a per centage on the amount insured was paid in addition, and agreed with the agent to continue the policy and give credit for the amount claimed until the next day. On the next day the premium and the extra amount claimed were tendered, but defendant refused to receive them. Tender was also made in 1871, and refused. *Held*, that as there was no agreement to pay, binding upon the owner, the promise of defendant was without consideration and not obligatory; but that even if the agreement was binding and the tender good to keep the policy in force for a year, it did not bind defendant to continue it in force thereafter, and defendant had the right to refuse so to do. *Id.*

— *Control of securities deposited with superintendent.*

See INSURANCE DEPARTMENT, 1.

— *What amounts to breach of warranty, and when company estopped by acts of agent.*

See *Baker v. Home L. Ins. Co.* (Mem.) 648

## JUDGMENTS.

1. Where the owner of premises conveyed to him subject to a mortgage, in ignorance of the lien thereon of a judgment against a former owner, subsequent to the mortgage, pays the mortgage and causes the same to be satisfied of record, he is entitled to have the same reinstated as a lien prior and paramount to the lien of the judgment. *Barnes v. Mott.* 397
2. Where lands incumbered by a judgment are conveyed with covenants of warranty to a purchaser for full value, the grantee and his successors in interest occupy a position similar to that of sureties for the judgment debtor and are entitled to the same equities. A release by the judgment creditor without their consent and with knowledge of their rights of any security to which, in equity, they would be entitled on payment of

the judgment, discharges the lien of the judgment. *Id.*

3. Accordingly *held*, where, after such a conveyance, the judgment debtor gave an undertaking on appeal from the judgment securing the amount thereof and staying proceedings to enforce the same, and after affirmance of the judgment the judgment creditor, with knowledge of the equitable rights of the owner and without his consent, released the sureties in the undertaking, that thereby the lien of the judgment was discharged. *Id.*

4. *It seems*, that the same principle would apply without regard to the covenants in the deed. *Id.*

5. A right to set off a judgment in favor of A. against B., against a judgment in favor of B. against A., cannot be asserted by motion on behalf of A., where it appears that before B.'s judgment was obtained he assigned his claim to a third person. If A. has any equities they can only be enforced by action, not by motion. *Swift v. Prouty.* 545

## JURISDICTION.

1. Under the provision of the charter of the city of Buffalo (chap. 519, Laws of 1870), authorizing the city to take the fee of lands for corporate purposes, proceedings were instituted to take lands of a railroad company, in accordance with a resolution of the common council. Upon appeal from an order appointing commissioners, the General Term *held* that the court at Special Term "had no authority to inquire into any thing except the mere regularity of the proceedings and as to who should be commissioners." *Held*, error; that a legal question was presented, *i. e.*, as to whether under the grant of power contained in the charter, the city was authorized to appropriate the fee of lands held by a railroad company, also for public use, and acquired by the exercise of the right of eminent domain, which question the

court hearing the application necessarily had the power to decide. *In re City of Buffalo.* 547

2. As to whether the charter confers the power to make such an appropriation, *quære.* *Id.*

— *Court of Appeals, no authority on affirmance of order confirming assessment, to grant rehearing.*

*See ASSESSMENT AND TAXATION, 5.*

— *Of Special Term, to vacate order confirming report of railroad commissioners.*

*See MOTION AND ORDER, 1.*

### JURY.

1. A challenge to the array of a grand jury cannot be allowed. (2 R. S., 724, §§ 27, 28.) *Carpenter v. The People.* 483

2. A challenge to the array of petit jurors, at a Court of General Sessions for the city and county of New York, alleged that the jurors were not selected by the commissioner of jurors of said county, and that neither he nor any one on his behalf attended the drawing; but that the jurors were selected by one appointed by the mayor as commissioner, and that the statute, under which the mayor acted, was unconstitutional. *Held*, that the challenge showed upon its face that the jury were selected by an officer *de facto*, whose acts, in the exercise of the functions of the office, were valid as to the public, and whose appointment could not be questioned collaterally; and that therefore a demurrer to the challenge was properly sustained. *Id.*

— *Alleged irregularities of drawing of, in New York city, when not ground for plea in abatement to indictment.*

*See INDICTMENT, 5, 6, 7.*

### LANDLORD AND TENANT.

1. Where an action of ejectment is brought by a landlord because of non-payment of rent and posses-

sion is delivered to him or his assignee, under and by virtue of a writ of possession, the statute giving to the defendant six months after such taking possession in which to redeem (2 R. S., 506, § 38) begins to run, and the time limited for redemption is not enlarged by a subsequent re-entry of the tenant. *Wilbeck v. Van Rensselaer.* 27

2. A parol lease of premises for a year to commence *in futuro* is not an executory contract prior to the time of taking possession. It vests a present interest in the term and cannot be rescinded by either party alone. *Becar v. Flues.* 518

3. In case, therefore, of a refusal of the lessee to perform, the lessor is not required to lease to another if he have an opportunity, and is not confined to his remedy for actual damages; but may refuse to accept the rescission and hold the lessee liable for the rent. *Id.*

*See LEASE.*

### LARCENY.

Every taking by one person of the personal property of another without the consent of the latter, without right or claim of right, and without intent to appropriate it, is not larceny; there must also be a felonious intent. *McCourt v. People.* 583

### LEASE.

1. Plaintiffs leased the first floor of a building in the city of New York for a store. In the rear was a yard attached to and exclusively appropriated for the use of the building, to which all the occupants had access through a hall running from the front to the rear of the building, and as the building was occupied when plaintiffs leased, no tenant could dispense with it. The rear of the store received light necessary for the transaction of business therein from windows opening into the

yard. A door opened from the store into the yard and one into said hall. The lessor consented that plaintiffs might close up these two doors at his own expense to make shelf room. Defendants, having leased the whole premises, subject to plaintiffs' lease, began to excavate in the yard for the purpose of building thereon. In an action to restrain such building, *held*, that plaintiffs by their lease acquired an easement in the yard, of which they were not deprived by the agreement as to closing the doors; that even if it should be held from the fact of closing the doors, that it was not the intention by the lease to give them access to the yard, yet they were entitled to enjoy an easement therein for the purpose of light and air, and defendants could not change it to their disadvantage. *Doyle v. Lord.* 432

2. Under the charter of the city of New York of 1873 (chap. 335, Laws of 1873) the common council have authority to take leases of real estate for the benefit of the city, and to determine what property shall be leased, and for what period, subject to the limitations and restrictions of said charter. *People ex rel. v. Green.* 499

3. This authority is not limited to the taking of such leases as are provided for by appropriations. The provision of said charter prohibiting the incurring of expenses not thus provided for (§ 89), has reference to the expenditures of the several departments, not to the action of the common council in leasing property deemed by it to be required for city purposes. *Id.*

4. In a return to a writ of alternative mandamus directed to the comptroller requiring him to lease from relators certain premises as authorized and directed by the common council, or to show cause, etc., the comptroller alleged, in substance, that there was no sufficient appropriation to pay the rent. *Held*, that he was estopped from claiming that it was not his

duty to execute the lease, and that the common council had no authority to require him to do so, as he had not based his refusal or his defence to the writ upon that ground. *Id.*

5. *It seems*, however, that the common council has power to authorize and to require the comptroller to supervise the taking of a lease and to execute it on behalf of the city. *Id.*

6. The provision of said charter (§ 15), making the signature of the clerk of the common council necessary to all leases, etc., refers only to leases from the city corporation, and does not include those to it. *Id.*

*See* LANDLORD AND TENANT.

## LICENSE.

— *To take possession under parol contract for sale of land, when implied.*  
*See* STATUTE OF FRAUDS.

## LIENS.

1. Where the owner of premises conveyed to him subject to a mortgage, in ignorance of the lien thereon of a judgment against a former owner, subsequent to the mortgage, pays the mortgage and causes the same to be satisfied of record, he is entitled to have the same reinstated as a lien prior and paramount to the lien of the judgment. *Barnes v. Mott.* 397

2. Where lands incumbered by a judgment are conveyed with covenants of warranty to a purchaser for full value, the grantee and his successors in interest occupy a position similar to that of sureties for the judgment debtor and are entitled to the same equities. A release by the judgment creditor without their consent and with knowledge of their rights of any security to which, in equity, they would be entitled on payment of the judgment, discharges the lien of the judgment. *Id.*

other parties in interest are concerned whether he is made a plaintiff or defendant. *Simson v. Satterlee*. 657

See CHATTEL MORTGAGE, 2, 3.

### FOREIGN LAW.

— *Law of another State to be learned only as a fact from evidence.*

See *Hull v. Mitcheson*. (Mem.) 639

### FORMER ADJUDICATION.

— *In action of ejectment, effect of.*  
See EJECTMENT, 8, 9.

### FORWARDERS.

Plaintiffs were forwarding merchants at T., and were employed by defendant to ship certain marble to him at P. The marble was shipped on board a canal boat which proceeded on the way as far as A. Learning that it was there delayed, one of the plaintiffs went to A. and there learned that the only tow-boat company it was practicable to employ to tow the boat down the H. river declined to take the boat unless the captain would pay an old bill, and would pay in advance the charge for towing. The captain had gone home to procure the money. Plaintiffs thereupon advanced the money and the boat was put into a tow, and by the negligence or unskillfulness of the employes of the tow-boat company was injured and sunk. In an action to recover for advances and charges, wherein the loss was set up as a counterclaim, *held*, that plaintiffs acted simply as forwarders, not as carriers; that by the transactions at A., they did not assume the carriage of the property; that they had a right, and it was their duty to pay the advance charges, and although defendant was not liable for the advance on the account of the captain, it was for his benefit, and he could not complain; and that as the loss did not occur by

any negligence on the part of plaintiffs, and was not a natural or ordinary consequence of any act of theirs, they were not liable therefor. *Stannard v. Prince*. 300

### FRAUD.

In an action upon a policy of life insurance defendant set up as a defence and proved that after the policy had been forfeited by reason of non-payment of premiums defendant was induced by false representations on the part of plaintiff (the assured) as to the health of the insured to receive the back premiums and to revive the policy. The insured died within a week thereafter. Defendant served an offer to allow judgment for the back premiums so received with interest and costs. The court directed a verdict for plaintiff on the ground that it was the duty of defendant, on discovery of the fraud, to have returned, or offered to return, the back premiums and to disaffirm the new contract; and not having done so the fraud was no defence. *Held*, error; that conceding the rule stated to be applicable to the case, it was substantially complied with by the offer of judgment; that defendant was not bound to make the offer before a claim was presented; and as the action was brought soon after the time allowed by the policy for the payment of the claim had elapsed, that the offer was made with sufficient and reasonable promptness; also that it was no answer that the offer not having been accepted within the time prescribed was to be deemed withdrawn, as the non-acceptance was the fault of the plaintiff. *Harris v. E. L. A. Society*. 196

— *When allegation of, insufficient to allow proof.*

See PARTNERSHIP, 5.

### FRAUDS (STATUTE OF).

See STATUTE OF FRAUDS.



GENERAL TERM.

A General Term has no power to review a case upon the facts on appeal from the judgment where the trial was by jury; the only mode in which the facts can be brought before it for review, is by appeal from order of Special Term or Circuit granting or refusing a new trial. *Boos v. W. M. L. Ins. Co.* 236

GOOD-WILL.

1. Where A. sells out the stock and good-will of a retail business to B., covenanting not to engage in, or carry on, the same business within certain limits, it is not necessary, in order to establish a breach of the covenant, to show that A. has solicited custom within the prescribed limits; if he, having established himself in the same business outside of the district, systematically and for profit, to an extent to constitute the carrying on of a business, sends to the houses of customers within the district, receives orders and delivers goods, this is a breach of the covenant, although it be done at the request of the customers and without his solicitation. *Sander v. Hoffman.* 248
2. If, occasionally, to oblige an old customer, A. sells to him goods, this is not a breach. *Id.*

GRAND JURY.

A challenge to the array of a grand jury cannot be allowed. (2 R. S., 724, §§ 27, 28.) *Carpenter v. The People.* 483

— *Alleged irregularities of drawing of, in New York city, when not ground for plea in abatement to indictment.*

See INDICTMENT, 5, 6, 7.

GUARDIAN AND WARD.

— *Right of infant when enforceable by mother as guardian in socage.*  
See EJECTMENT, 11.

— *Rights of mother as guardian in socage.*

See *Roulston v. Roulston.* (Mem.) 652

HABEAS CORPUS.

An order quashing a writ of *habeas corpus* can only be reviewed upon appeal. A writ of error will not lie in such case. *People ex rel. v. Conner.* 481

HIGHWAYS.

1. Although a highway crossing a railroad track has been regularly laid out, yet until it has been actually opened or notice "of such laying out" has been served upon an officer of the railroad corporation named in and as required by the act of 1853 (chap. 62, Laws of 1853), the duty imposed by the general railroad act, as amended in 1854 (§ 7, chap. 282, Laws of 1854), of ringing a bell or sounding a whistle upon a train approaching the crossing, does not attach; the highway is not "a traveled public road or street" within the meaning of said last-mentioned act. *Cordell v. N. Y. C. and H. R. R. R. Co.* 535
2. Slight inconveniences and occasional interruptions in the use of a highway or navigable stream, which are temporary and reasonable, are not illegal merely because the public may not, for the time, have the full use of the highway or stream. *People v. Horton.* 610

— *Borrowing money by towns for building roads and bridges.*

See TOWN BONDING, 1, 2, 3, 4, 5.

HOTEL KEEPER

See INNKEEPER.

HUSBAND AND WIFE.

1. Under the provisions of the Revised Statutes (2 R. S., 146, § 48), declaring that a wife convicted of adultery in an action brought against her by her husband for

- divorce, shall not be entitled to dower in his real estate, it is only where, upon proof and a finding or verdict of adultery, the court has, in such an action, given judgment of divorce against the wife and dissolved the marriage contract that her right of dower is lost; the forfeiture is not a consequence of the offence, but of the judgment founded thereon. *Schiffer v. Pruden.* 47
2. Where, therefore, in an action of divorce *a vinculo* brought by a husband against his wife, the referee found the wife guilty of the adultery charged, but also found the husband guilty of the same offence, and thereupon a judgment was entered dismissing the complaint, *held*, that the wife had not lost her right of dower; that this possibility of dower affected the title to lands deeded by the husband, she not having joined in the deed or in any manner relinquished her right; and that a vendee who had contracted to purchase and pay for the premises upon delivery of a deed assuring to him the fee, clear of all incumbrances, was not required to accept such title. *Id.*
3. The fact that the wife of A. owns the fee of the land on which stands the house in which he lives with his family, is not necessarily inconsistent with his having such a possession of the house as will entitle him to maintain an action against a trespasser for forcibly entering it. *Alexander v. Hard.* 228
4. Plaintiff built a house upon the land of his wife, in which he lived with his family, having possession and control thereof. He operated the farm in his own name, owned the stock and provided for his family. In an action for unlawfully and violently breaking into and entering the dwelling-house the court charged that plaintiff could not recover for damages to the house. *Held*, error; that the facts were sufficient to authorize a finding of a possession in plaintiff sufficient to entitle him to maintain the action. *Id.*
5. Where a married man takes boarders into his house, or converts it into a hospital for the sick, and his wife takes charge of his establishment or renders services in the house to boarders or sick persons, in the absence of proof of any special agreement, all her services and earnings belong to her husband, and he can maintain an action to recover therefor. *Reynolds v. Robinson.* 589
6. In an action to recover for services rendered to a boarder sick with cancer, evidence on the part of plaintiff was received, under objection, that the health of his wife was injured by the stench of the cancer. *Held*, no error; that the evidence was competent, not to lay a foundation for recovery for the loss of health, but to show the nature of the services. *Id.*

## INDEMNITY.

Where a promissory note is lost and an action is brought thereon, the defendant is entitled to the indemnity provided by statute (2 R. S., 406, § 75) in actions upon lost negotiable instruments; and this, although it appears that the note has not been indorsed; indemnity must be given without regard to the fact of actual negotiation. *Frank v. Wessels.* 153

## INDIANS.

1. This court will take judicial notice of the fact that the tract of land known as the "Pulteney estate" was ceded by the State of New York to the State of Massachusetts by the treaty and deed of cession executed December 16, 1786, and that under the proper authority, State and national, the Indian title to said lands has been extinguished. *Howard v. Moot.* 262
2. As to whether the fact that the Indian right of occupation of lands within this State had not been extinguished with the sanction of



the State government or, abandoned by the Indians, can be set up by one without title, as against the owner in fee subject to such rights, *quære*. *Id.*

3. All the terms and conditions of the said treaty, upon which depended the right of Massachusetts and her grantees to an absolute and indefeasible estate in the lands granted, *held*, to have been substantially performed. *Id.*

### INDICTMENT.

1. In an indictment for perjury alleged to have been committed on an investigation before the fire marshal of New York city, it was alleged that the accused swore there were 60,000 cigars in the building at the time of the fire. The proof was that he swore there were 65,000 cigars. This was one of various items of property as to which the accused was charged with having sworn falsely. On error it was objected that there was a fatal variance between the indictment and the proof. The objection was not taken on the trial. *Held*, that it was not available here, as if made upon the trial, the evidence as to this item could have been excluded or waived, and the jury directed to disregard it, and the conviction could have been sustained upon the proof as to the other items. Also, *held*, that the variance was not material. *Harris v. The People*. 148

2. When an indictment charges that the accused has sworn falsely as to several facts, it is not necessary to prove all that is charged. It is sufficient to prove enough to make out the offence. *Id.*

3. There were two counts in the indictment, the first charging perjury in the oral testimony given before the fire marshal, and the other perjury in swearing to an affidavit before the same officer, containing in substance the same matters as testified to orally. The jury found the prisoner not guilty

under the first count and guilty under the second. It was claimed that the verdict was inconsistent. It appeared that a portion of the oral testimony was taken when the fire marshal was not present. *Held*, that the objection was untenable, as the jury may have found that the oral testimony alleged to be false was not taken before the marshal. *Id.*

4. A plea in abatement to an indictment is to be strictly construed; it must be drawn with precision and accuracy and must be certain to every intent. *Dolan v. The People*. 485

5. A plea in abatement to an indictment found at a Court of General Sessions in the city of New York alleging that the annual grand jury list was not wholly selected, as required by statute (chap. 498, Laws of 1853), from the petit jury lists made out by the commissioner of jurors, without any averments of fraud or design, is not good. The fact that a few names not appearing on the petit jury lists are accidentally put upon the grand jury list does not vitiate the whole list, and that it was by accident or oversight is to be presumed in the absence of allegations of fraud or design. *Id.*

6. Nor is it a good plea that some one of the fifty selected as the special panel of grand jurors (§ 28, chap. 539, Laws of 1870) was not upon the petit jury lists, in the absence of an allegation that the persons actually sworn and impaneled were not upon that list. It is necessary also in such a plea to give the names of the persons alleged to have been selected and drawn who were not upon the petit jury lists. *Id.*

7. It is not a good plea that the commissioner of jurors was prevented by duress from attending upon or supervising the grand jury. In the absence of allegations as to how the grand jury was drawn and by whom, it is to be presumed that the drawing was made by some other person claiming the office, acting as *de facto* commis-

sioner, and recognized as such by all the officers having relations with him or his work; and a jury drawn by a *de facto* commissioner is regular. *Id.*

8. An indictment setting forth a felony and then charging the killing of another by the accused while engaged in the commission thereof, is not void for duplicity. It charges but one offence, that of murder in the first degree, within one of the definitions of that offence in the act of 1873 (chapter 644, Laws of 1873), *i. e.*, the killing by a person while engaged in the commission of a felony. *Id.*

9. Where one breaks into a dwelling-house burglariously with intent to steal, he is engaged in the commission of the crime until he leaves the building with his plunder; and if, while engaged in any of the acts immediately connected with his crime, he kills a person resisting him he is guilty of murder under said statute. *Id.*

10. It is not necessary in an indictment charging the crime of murder under said provision to allege that the killing was "without any design to effect death;" an allegation that it was willful and felonious is proper and sufficient. The object of the words quoted is to dispense with proof of a design to effect death, not to require proof that there was no such design. *Id.*

#### INJUNCTION.

1. An order of reference, under section 222 of the Code, to ascertain damages upon an undertaking given upon the granting of an injunction, cannot be regularly granted until judgment has been entered; but where the order is entered by plaintiff's consent this obviates the objection. *Lawton v. Green.* 326

2. The limit of liability upon such an undertaking is the amount specified therein, and the court has no power to make any allow-

ance beyond that amount for disbursements. Referee fees upon the reference are part of the damages, and recoverable as such. *Id.*

3. Accordingly, *held*, that an allowance for disbursements and referee fees over and above the sum specified in the undertaking was error. *Id.*

4. Such a proceeding is not a proceeding "in the action;" it is a proceeding after judgment, constituting no part of the action, and the court has no power to give costs therein. *Id.*

5. The final order in such proceedings should be limited to fixing the amount of damages, and a provision therein requiring the plaintiff to pay the same is improper. The amount of damages so ascertained is conclusive upon the parties and the sureties, but payment can only be enforced by action upon the undertaking. *Id.*

6. If a craft of any kind is adapted for use in any employment for which a canal may lawfully be used, and is actually employed in a business lawful in itself, and does not in the conduct of such business unreasonably or unnecessarily obstruct the navigation of the canal by other vessels, a court of equity will not forbid the use of the craft in such employment; and this, although some obstruction to the free passage of vessels necessarily results from the peculiar employment. *Horton v. People.* 610

7. It is not the province of a court of equity to proscribe one branch of a business in which a party is engaged, while permitting every other branch of the same business to be carried on in the same locality and with the same instrumentalities. *Id.*

8. Defendants were the owners of a floating elevator, which was used by them in the "Buffalo City Ship canal" (an artificial channel, forming part of the harbor of that city), for the purpose of transferring grain in bulk from

lake vessels to canal boats, moving from place to place as required. When not in use it was moored opposite lands owned by defendants. The channel of the canal is 160 feet wide. When employed in unloading a vessel, with the vessel on one side and a canal boat on the other, the three crafts occupy less than eighty feet of the channel, and a transfer of the load of a vessel is made in a few hours. Vessels moving in the canal are moved by steam power. In an action by the attorney-general in behalf of the people, a judgment was rendered restraining such use, but allowing the use of the elevator for unloading vessels aground or for any other purpose. *Held*, error; that the use was not an unnecessary, unreasonable and unlawful use of the canal, or an unreasonable and unlawful obstruction to trade and commerce, but was in aid of commerce. *Id.*

9. It is not an excuse for the violation of an injunction that the order is more extensive in its restraints than the prayer of the complaint; the order, if irregular, is not void, and while it is in force it is the duty of the defendant to obey it. *Mayor, etc., v. N. Y. and S. I. F. Co.* 622

10. Corporations may be restrained by injunction, and may be fined for violating the injunction. *Id.*

11. Where, upon motion to punish a party for contempt in violating an injunction, there is legal evidence sufficient to call for the exercise of the judgment and discretion of the court, its decision is not reviewable here. *Id.*

12. A party, bound to obey an injunction, may be guilty of a violation thereof as well as aiding, abetting and countenancing others in violating it as by doing it directly; such orders must be honestly and fairly obeyed. *Id.*

18. Where proceedings to punish a party for contempt, in violating an injunction, are commenced by an order to show cause, interro-

gatories need not be filed prior to a final adjudication upon the alleged contempt. *Id.*

— *To restrain proceedings by mandamus, when improper.*

*See CANALS, 1, 2.*

— *When action to restrain party from building up to line of street cannot be maintained.*

*See CONTRACTS, 1.*

— *To restrain making new contract by State officer, when not proper.*

*See CONTRACTS, 6.*

## INNKEEPER.

1. Under the provisions of the innkeepers' act of 1866 (chapter 658, Laws of 1866), exempting an innkeeper from liability for the loss by fire of property of a guest in a barn or outbuilding, where it shall appear that the loss was the work of an incendiary, and occurred without negligence on his part, the burden is upon the innkeeper to show that the fire was an incendiary one, and to show absence of negligence on his part. *Faucett v. Nichols.* 877

2. In an action to recover for such a loss, evidence was given tending to show that the fire was the work of an incendiary, who gained access to the hay loft, where the fire was set, through a window opening into an alley. The window was left open and lumber was piled against the barn so that a person could easily climb upon it and enter the window. The court submitted to the jury the question whether leaving the window open was negligence, charging that if so, and it contributed to occasion an incendiary firing, defendant was liable. *Held*, no error; that the facts proved, although not strong, were some evidence of negligence sufficient to authorize the submission of the question to the jury; and that the negligent omission by an innkeeper to take reasonable and prudent precaution to guard against an incendiary fire was such negligence as would deprive him of the benefit of the act. *Id.*

3. Negligence, which precedes and facilitates the commission of the crime, is as much within the statute as the negligent omission to protect and remove the property after discovery of the fire. *Id.*

4. The question as to whether the fire was of incendiary origin was contested. Defendant offered to show that on the night of the fire an attempt was made to fire another building, a short distance from the barn of defendant, by the use of similar means to those which defendant's evidence tended to show were used in firing said barn. This evidence was objected to, and objection sustained. *Held*, error; that the evidence was competent as bearing upon the question of the origin of the fire. *Id.*

#### INSURANCE DEPARTMENT.

1. By the act of 1875 (chap. 337, Laws of 1875), providing for the distribution of the property and effects of the Eclectic Life Insurance Company no authority is given to the court to direct the superintendent of the insurance department to transfer to the receiver of said company for the purposes of distribution, the securities, etc., belonging to said company, deposited with him for the protection of policyholders; it was the intent of the act, upon an order being obtained in the manner prescribed therein, to require such distribution to be made by the superintendent himself. *People ex rel. Ruggles v. Chapman.* 557

2. Accordingly, *held*, that an order directing the issuing a writ of mandamus requiring said superintendent to assign and deliver to the receiver the securities, money and property of said company in his hands, was improperly granted. *Id.*

#### INSURANCE (FIRE).

1. An insurance broker employed by a party to effect insurance for him

may be regarded by the insurer as clothed with full authority to act for his principal in procuring, modifying or canceling policies; and his acts in these respects are binding upon his principal. *S. O. Co. v. T. I. Co.* 85

2. In an action upon a policy of fire insurance defendant claimed and proved that the policy was surrendered to defendant for cancellation and was canceled before the loss. Plaintiff claimed that such surrender was by mistake. The court, before whom the action was tried, did not find as a fact the mistake claimed, but in the conclusions of law, held that the return of the policy indorsed for cancellation, although by mistake, would defeat the action. Upon settlement of the case plaintiff's counsel requested the judge to find the mistake; this he refused to do. The evidence as to the mistake was not conclusive. *Held*, that upon the report itself the conclusion of law could not be disturbed as it could not be determined therefrom that the court would have found a mistake; that the subsequent refusal so to find was equivalent to a finding against the fact; but if regarded as a refusal to find either way the remedy of the party was by motion to compel a finding. *Id.*

3. The policy was obtained by a broker employed by plaintiff. It contained a clause giving defendant power to raise the rate of insurance. Defendant's agent notified the broker that it would raise the rate one per cent. The broker assented and agreed to bring the policy to have it indorsed thereon; this he did not do. Defendant was allowed to prove, under objection, the custom among brokers in the city to consider the matter concluded, unless such indorsement was made, allowing a reasonable time to bring the policy for that purpose. *Held*, no error. *Id.*

4. Defendant was permitted to show entries upon the broker's book showing the cancellation of the policy. These were objected to unless evidence was given show-

ing that plaintiff had knowledge of them. The objection was overruled. *Held*, no error; that the evidence was competent as bearing upon the question of mistake and upon the credibility of the broker and his clerks, who were witnesses for plaintiff. *Id.*

5. Defendant issued to plaintiff a policy of fire insurance containing a clause requiring the assured in case of loss to furnish proof thereof within thirty days. A loss having occurred, plaintiff failed to furnish the required proof. An adjuster of defendant within the thirty days visited the premises and made inquiries into the circumstances of the fire. This was without authority from defendant and without the knowledge of plaintiff. Upon receipt of proof of loss some four months after the fire, defendant sent a letter to plaintiff's attorney stating that the proof of loss was too late; also, that after careful examination they were satisfied the case was fraudulent, and therefore rejected the claim. In an action upon the policy, *held*, that a refusal of the court to nonsuit plaintiff was error; that proof of loss within the time prescribed was necessary unless waived; and that there was no evidence of a waiver. *Blossom v. L. F. Ins. Co.* 162

6. As to whether the omission of an insurer to raise the objection of a non-compliance with such a condition upon being furnished with proof long after the expiration of the time specified, can be deemed a waiver, *quære*. *Id.*

7. In an action to reform a policy of fire insurance upon a dwelling-house, the alleged mistake was that an adjoining building was intended to be insured instead of the dwelling described. It appeared that the applicant had owned both buildings and had lived in the one described; that defendant's agent had insured the furniture therein; that he had insured the building claimed to have been intended and the policy was then outstanding. He had the description of both buildings upon his books. The

applicant had removed from the dwelling to the adjoining building, which was occupied as a dwelling and paint shop, and did not, in fact, own the former. The agent, however, testified that he supposed that he did. The premium upon the dwelling was one and one-half per cent; upon the building it was two and one-half. The application was, by letter for a policy on "my house." The agent, thereupon, made out the policy in question upon the dwelling, charging one and one-half per cent. The building was burned. The only direct evidence to establish that defendant intended to insure the building was that of the agent who, in answer to the question, "To what property *do* you understand this letter \* \* \* referred?" answered, to the property burned. Upon his cross-examination he testified, in substance, that at the time and before the policy was issued he was in doubt, but his idea was it was on the dwelling and he so made out the policy. *Held*, that the facts did not show an intent, on the part of defendant, to insure the building burned, and did not justify a reformation of the policy. *Mead v. W. F. Ins. Co.* 458

8. A policy of fire insurance contained a condition requiring proofs of loss to be furnished by the insured within twenty days. It also contained a clause, in substance, that nothing save an agreement in writing, signed by an officer of the company, should be considered as a waiver of any condition or restriction in the policy. In an action upon the policy, *held*, that a local agent had no authority to waive such condition. *Van Allen v. F. J. S. Ins. Co.* 469

#### INSURANCE (LIFE).

1. In an action upon a policy of life insurance defendant set up as a defence and proved that after the policy had been forfeited by reason of non-payment of premiums defendant was induced by false representations on the part of plaintiff (the assured) as to the



health of the insured to receive the back premiums and to revive the policy. The insured died within a week thereafter. Defendant served an offer to allow judgment for the back premiums so received with interest and costs. The court directed a verdict for plaintiff on the ground that it was the duty of defendant, on discovery of the fraud, to have returned, or offered to return, the back premiums and to disaffirm the new contract; and not having done so the fraud was no defence. *Held*, error; that conceding the rule stated to be applicable to the case, it was substantially complied with by the offer of judgment; that defendant was not bound to make the offer before a claim was presented; and as the action was brought soon after the time allowed by the policy for the payment of the claim had elapsed, that the offer was made with sufficient and reasonable promptness; also that it was no answer that the offer not having been accepted within the time prescribed was to be deemed withdrawn, as the non-acceptance was the fault of the plaintiff. *Harris v. E. L. A. S.* 196

2. In an action upon a policy of life insurance the defence was the falsity of various answers to questions in the application which were, by the terms of the policy, made warranties. After the defendant's counsel had, upon the trial, specified certain answers which he claimed to be false, on motion to dismiss, in exceptions to the submission of questions to the jury and in requests to charge, he requested the court to charge that upon the policy and the evidence the plaintiff could not recover any thing beyond the amount of the last premium. *Held*, that the general objection did not entitle defendant to raise on appeal points as to the falsity of answers which were not specified, and as to which no question of law was raised and passed upon on the trial. *Boos v. W. M. L. Ins. Co.* 236

8. In answer to a question as to whether he had had, during the last

seven years any severe sickness or disease, the insured answered "No." The policy was issued in 1870. Evidence was given showing that in 1865, the insured had an attack of pneumonia which lasted ten days, during which he was attended by a physician. Plaintiff's witnesses testified that during this time he was a strong, healthy man. One witness, not shown to be competent to speak as to the nature of the illness, testified that plaintiff had sunstroke in 1863, or 1865. *Held*, that the court was not bound to decide, as matter of law, that either was "a severe sickness or disease" within the meaning of the question, and that the question of a breach of warranty was one of fact for the jury. *Id.*

4. A policy of life insurance contained a clause avoiding it in case the insured should visit any part of the United States lying south of a specified line, between the first of July and the first of September, without a written permit. He had a permit authorizing him to go and remain south until July 1, 1870. He remained until he died, March 18, 1872. In an action upon the policy, it appeared that the health of the deceased, in the summer of 1870, was very poor, so that he could only ride out in a buggy to his plantation and back, and was never any better. It was not proved that he was too unwell to return, or that he made any effort to do so. *Held*, (1) that if inability was an excuse and a failure to return in consequence would not have been a breach of the condition, the facts did not sustain the claim, as it did not appear that the insured was, prior to July first so unwell as to render it impossible for him to return by any of the usual modes of travel; (2) that inability was not an excuse, as when the insured went south he took the chances of his being able to return. *Evans v. U. S. L. Ins. Co.* 304
5. On the day the annual premium became due in 1870, an agent of the owner of the policy called at defendant's office to pay it. De-

fendant declined to receive it because the insured was residing south, unless a per centage on the amount insured was paid in addition, and agreed with the agent to continue the policy and give credit for the amount claimed until the next day. On the next day the premium and the extra amount claimed were tendered, but defendant refused to receive them. Tender was also made in 1871, and refused. *Held*, that as there was no agreement to pay, binding upon the owner, the promise of defendant was without consideration and not obligatory; but that even if the agreement was binding and the tender good to keep the policy in force for a year, it did not bind defendant to continue it in force thereafter, and defendant had the right to refuse so to do. *Id.*

— *Control of securities deposited with superintendent.*

See INSURANCE DEPARTMENT, 1.

— *What amounts to breach of warranty, and when company estopped by acts of agent.*

See *Baker v. Home L. Ins. Co.* (Mem.) 648

## JUDGMENTS.

1. Where the owner of premises conveyed to him subject to a mortgage, in ignorance of the lien thereon of a judgment against a former owner, subsequent to the mortgage, pays the mortgage and causes the same to be satisfied of record, he is entitled to have the same reinstated as a lien prior and paramount to the lien of the judgment. *Barnes v. Mott.* 397
2. Where lands incumbered by a judgment are conveyed with covenants of warranty to a purchaser for full value, the grantee and his successors in interest occupy a position similar to that of sureties for the judgment debtor and are entitled to the same equities. A release by the judgment creditor without their consent and with knowledge of their rights of any security to which, in equity, they would be entitled on payment of

the judgment, discharges the lien of the judgment. *Id.*

3. Accordingly *held*, where, after such a conveyance, the judgment debtor gave an undertaking on appeal from the judgment securing the amount thereof and staying proceedings to enforce the same, and after affirmance of the judgment the judgment creditor, with knowledge of the equitable rights of the owner and without his consent, released the sureties in the undertaking, that thereby the lien of the judgment was discharged. *Id.*
4. *It seems*, that the same principle would apply without regard to the covenants in the deed. *Id.*
5. A right to set off a judgment in favor of A. against B., against a judgment in favor of B. against A., cannot be asserted by motion on behalf of A., where it appears that before B.'s judgment was obtained he assigned his claim to a third person. If A. has any equities they can only be enforced by action, not by motion. *Swift v. Prouty.* 545

## JURISDICTION.

1. Under the provision of the charter of the city of Buffalo (chap. 519, Laws of 1870), authorizing the city to take the fee of lands for corporate purposes, proceedings were instituted to take lands of a railroad company, in accordance with a resolution of the common council. Upon appeal from an order appointing commissioners, the General Term *held* that the court at Special Term "had no authority to inquire into any thing except the mere regularity of the proceedings and as to who should be commissioners." *Held*, error; that a legal question was presented, *i. e.*, as to whether under the grant of power contained in the charter, the city was authorized to appropriate the fee of lands held by a railroad company, also for public use, and acquired by the exercise of the right of eminent domain, which question the

court hearing the application necessarily had the power to decide. *In re City of Buffalo.* 547

2. As to whether the charter confers the power to make such an appropriation, *quære.* *Id.*

— *Court of Appeals, no authority on affirmance of order confirming assessment, to grant rehearing.*

See ASSESSMENT AND TAXATION, 5.

— *Of Special Term, to vacate order confirming report of railroad commissioners.*

See MOTION AND ORDER, 1.

### JURY.

1. A challenge to the array of a grand jury cannot be allowed. (2 R. S., 724, §§ 27, 28.) *Carpenter v. The People.* 483

2. A challenge to the array of petit jurors, at a Court of General Sessions for the city and county of New York, alleged that the jurors were not selected by the commissioner of jurors of said county, and that neither he nor any one on his behalf attended the drawing; but that the jurors were selected by one appointed by the mayor as commissioner, and that the statute, under which the mayor acted, was unconstitutional. *Held*, that the challenge showed upon its face that the jury were selected by an officer *de facto*, whose acts, in the exercise of the functions of the office, were valid as to the public, and whose appointment could not be questioned collaterally; and that therefore a demurrer to the challenge was properly sustained. *Id.*

— *Alleged irregularities of drawing of, in New York city, when not ground for plea in abatement to indictment.*

See INDICTMENT, 5, 6, 7.

### LANDLORD AND TENANT.

1. Where an action of ejectment is brought by a landlord because of non-payment of rent and posses-

sion is delivered to him or his assignee, under and by virtue of a writ of possession, the statute giving to the defendant six months after such taking possession in which to redeem (2 R. S., 506, § 33) begins to run, and the time limited for redemption is not enlarged by a subsequent re-entry of the tenant. *Wilbeck v. Van Rensselaer.* 27

2. A parol lease of premises for a year to commence *in futuro* is not an executory contract prior to the time of taking possession. It vests a present interest in the term and cannot be rescinded by either party alone. *Becar v. Flues.* 518

3. In case, therefore, of a refusal of the lessee to perform, the lessor is not required to lease to another if he have an opportunity, and is not confined to his remedy for actual damages; but may refuse to accept the rescission and hold the lessee liable for the rent. *Id.*

See LEASE.

### LARCENY.

Every taking by one person of the personal property of another without the consent of the latter, without right or claim of right, and without intent to appropriate it, is not larceny; there must also be a felonious intent. *McCourt v. People.* 583

### LEASE.

1. Plaintiffs leased the first floor of a building in the city of New York for a store. In the rear was a yard attached to and exclusively appropriated for the use of the building, to which all the occupants had access through a hall running from the front to the rear of the building, and as the building was occupied when plaintiffs leased, no tenant could dispense with it. The rear of the store received light necessary for the transaction of business therein from windows opening into the



yard. A door opened from the store into the yard and one into said hall. The lessor consented that plaintiffs might close up these two doors at his own expense to make shelf room. Defendants, having leased the whole premises, subject to plaintiffs' lease, began to excavate in the yard for the purpose of building thereon. In an action to restrain such building, *held*, that plaintiffs by their lease acquired an easement in the yard, of which they were not deprived by the agreement as to closing the doors; that even if it should be held from the fact of closing the doors, that it was not the intention by the lease to give them access to the yard, yet they were entitled to enjoy an easement therein for the purpose of light and air, and defendants could not change it to their disadvantage. *Doyle v. Lord.* 432

2. Under the charter of the city of New York of 1873 (chap. 335, Laws of 1873) the common council have authority to take leases of real estate for the benefit of the city, and to determine what property shall be leased, and for what period, subject to the limitations and restrictions of said charter. *People ex rel. v. Green.* 499

3. This authority is not limited to the taking of such leases as are provided for by appropriations. The provision of said charter prohibiting the incurring of expenses not thus provided for (§ 89), has reference to the expenditures of the several departments, not to the action of the common council in leasing property deemed by it to be required for city purposes. *Id.*

4. In a return to a writ of alternative mandamus directed to the comptroller requiring him to lease from relators certain premises as authorized and directed by the common council, or to show cause, etc., the comptroller alleged, in substance, that there was no sufficient appropriation to pay the rent. *Held*, that he was estopped from claiming that it was not his

duty to execute the lease, and that the common council had no authority to require him to do so, as he had not based his refusal or his defence to the writ upon that ground. *Id.*

5. *It seems*, however, that the common council has power to authorize and to require the comptroller to supervise the taking of a lease and to execute it on behalf of the city. *Id.*

6. The provision of said charter (§ 15), making the signature of the clerk of the common council necessary to all leases, etc., refers only to leases from the city corporation, and does not include those to it. *Id.*

*See* LANDLORD AND TENANT.

## LICENSE.

— *To take possession under parol contract for sale of land, when implied.*  
*See* STATUTE OF FRAUDS.

## LIENS.

1. Where the owner of premises conveyed to him subject to a mortgage, in ignorance of the lien thereon of a judgment against a former owner, subsequent to the mortgage, pays the mortgage and causes the same to be satisfied of record, he is entitled to have the same reinstated as a lien prior and paramount to the lien of the judgment. *Barnes v. Mott.* 397

2. Where lands incumbered by a judgment are conveyed with covenants of warranty to a purchaser for full value, the grantee and his successors in interest occupy a position similar to that of sureties for the judgment debtor and are entitled to the same equities. A release by the judgment creditor without their consent and with knowledge of their rights of any security to which, in equity, they would be entitled on payment of the judgment, discharges the lien of the judgment. *Id.*

8. Accordingly *held*, where, after such a conveyance, the judgment debtor gave an undertaking on appeal from the judgment securing the amount thereof and staying proceedings to enforce the same, and after affirmance of the judgment the judgment creditor, with knowledge of the equitable rights of the owner and without his consent, released the sureties in the undertaking, that thereby the lien of the judgment was discharged. *Id.*

4. *It seems*, that the same principle would apply without regard to the covenants in the deed. *Id.*

5. As to whether an action can be maintained by one claiming a prior equitable lien upon personal property against a subsequent mortgagee upon the ground that defendant has so conducted himself in the exercise of his legal right of sale as unnecessarily to reduce the value of plaintiff's lien, *quære*. *Hale v. Omaha Nat. Bank.* 550

6. Such an action cannot be maintained where it appears that defendant did nothing but exercise his legal right to foreclose his mortgage and sell the interest of the mortgagor in the property. *Id.*

7. Plaintiff's complaint alleged, in substance, that he had an equitable lien upon certain personal property, which property defendant wrongfully sold and converted to his own use, thereby depriving plaintiff of his lien. It appeared that the property was taken and sold by defendant under and by virtue of certain chattel mortgages thereon. It did not appear that the property was sold in parcels or was scattered or dissipated, or that it was sold to a *bona fide* purchaser without notice of plaintiff's lien, or that the property was sold in hostility to plaintiff's rights. It did appear that the property was sold for its full value, but that only the rights and interests of the mortgagors and of defendant were sold. *Held*, that the fact that the property was sold for full value was insufficient to establish that the sale was hostile to plain-

tiff, and was not inconsistent with his right to enforce his lien; and that a cause of action for an injury to plaintiff's lien was not established. *Id.*

## LOST INSTRUMENTS.

— *Indemnity in action on lost note.*

*See* BILLS, NOTES AND CHECKS, 2.

## MANDAMUS.

1. In a return to a writ of alternative mandamus directed to the comptroller requiring him to lease from relators certain premises as authorized and directed by the common council, or to show cause, etc., the comptroller alleged, in substance, that there was no sufficient appropriation to pay the rent. *Held*, that he was estopped from claiming that it was not his duty to execute the lease, and that the common council had no authority to require him to do so, as he had not based his refusal or his defence to the writ upon that ground. *People ex rel. v. Green.* 499

2. An order directing the issuing of a writ of peremptory mandamus to compel the performance of an act required by law is only proper in case of a clear, unquestioned, legal right. It should not be granted where the claim is disputed and its validity controverted. *People ex rel. Mott v. Bd. Suprs. Greene Co.* 600

3. In such case an alternative writ should issue. *Id.*

4. Where, upon the return of an order to show cause why a mandamus should not issue, the relator takes no issue upon the allegations of the affidavits and papers presented by defendant, but proceeds to argument and asks for a peremptory writ; this is equivalent to a demurrer, *i. e.*, it is an admission of the truth of those allegations, as statements of facts, but a denial of their sufficiency in law

to prevent the issuing of the writ, and if the papers set forth facts showing the relator not entitled to the relief sought, the writ cannot be granted. *People ex rel. Tenth Nat. Bank v. Board Apportionment.* 627

5. Where a party has a remedy by action, relief by mandamus will be denied. *Id.*

— *Directing superintendent of insurance department to deliver over securities to receiver, when improper.*

See INSURANCE DEPARTMENT, 2.

— *When not proper to compel board of supervisors to impose tax to pay town bonds.*

See TOWN BONDING, 7.

## MANUFACTURING CORPORATIONS.

1. A complaint setting forth facts sufficient and seeking to charge defendant, as a stockholder of a manufacturing corporation, organized under the general laws (chap. 40, Laws of 1849), with a debt of the corporation, because of a failure to make and record the certificate required by said act (§ 10), and also alleging the requisite facts, and seeking to charge him, as trustee, with the debt, because of failure to file an annual report (§ 12), contains two separate and distinct causes of action which cannot properly be united. *Wiles v. Suydam.* 173
2. The first cause of action is one upon contract, the second is an action upon a statute for a penalty or forfeiture. *Id.*

## MARRIED WOMEN.

1. In order to charge the separate estate of a married woman with a debt it is not necessary that there be a specific agreement to that effect. The intent may be inferred from the surrounding circumstances. *Conlin v. Cantrell.* 217
2. Defendant, a married woman, lived separate and apart from her

husband. She had a separate estate and supported herself. Plaintiff did work as seamstress, under a contract with her, for herself and children. Defendant, before the work was done, informed plaintiff that she had a separate estate, and plaintiff testified she trusted her for that reason. Defendant promised to pay when she received her rents. In an action to recover for the work, *held*, that the evidence was sufficient to authorize a finding of an intent to charge defendant's separate estate and to sustain a judgment against her. *Id.*

See HUSBAND AND WIFE.

## MASSACHUSETTS.

— *Title of, and of grantees to lands ceded by New York.*

See TREATY, 1, 3.

## MARSHALING ASSETS.

— *To effect change in, order of direction must be clear and positive.*

See TRUSTS AND TRUSTEES, 8.

## MASTER AND SERVANT.

1. A master is not responsible to an employe for the negligent act of a competent and proper foreman to whom there has been no delegation of power and control of the business or a branch thereof, but who is simply charged with special duties, performing them under the direction of the master, the latter retaining general control and supervision. *Malone v. Hathaway.* 5
2. It is only where the master withdraws from the management of the business, intrusting it to a middleman or superior servant; or where, as in case of a corporation, the business is of such a nature that the general management and control thereof is necessarily committed to agents, that the master can be held liable to a subordinate for the negligent acts of one thus acting in his stead. *Id.*

3. Defendant's firm was engaged in operating a brewery, the partners themselves personally superintending the business. They employed B., a competent and experienced carpenter to make examinations and repairs for the purpose of keeping the brewery in a safe condition. By the giving way of some joists or posts supporting a mash tub, which had become decayed, the tub fell, causing the death of plaintiff's intestate, a laborer in the employ of defendant's firm. New and proper supports had been put in about eleven months before the accident. The decay was not visible, and no evidence was given that defendant or his partner knew or ought to have known that the supports were defective. The court submitted the case to the jury upon the question as to whether there was negligence on the part of B. in omitting to examine and keep the building in repair, ruling, in substance, that if such negligence was found defendant was liable. *Held* (CHURCH, Ch. J., and RAPALLO, J., dissenting), error; that for such negligence defendant was not liable, in the absence of evidence of any neglect or omission of duty on the part of his firm. *Id.*
  4. To make a master liable for the wrongful act of a servant to the injury of a third person it is not necessary to show that he expressly authorized the particular act, it is sufficient to show that the servant was engaged at the time in doing his master's business and was acting within the general scope of his authority; and this, although he departed from the private instructions of the master, abused his authority, was reckless in the performance of his duty and inflicted unnecessary injury. *Rounds v. D. L. and W. R. R. Co.* 129
  5. While the master is not responsible for the willful wrong of the servant, not done with a view to the master's service or for the purpose of executing his orders, if the servant is authorized to use force against another when necessary in executing his master's orders, and if while executing such orders through misjudgment or violence of temper the servant use more force than is necessary, the master is liable. *Id.*
  6. Where a master claims exemption from liability for the tortious act of his servant while apparently engaged in executing his orders upon the ground that the servant was in fact pursuing his own purpose without regard to his master's business, and was acting willfully and maliciously, it is ordinarily a question to be determined by the jury. *Id.*
  7. Plaintiff jumped upon the platform of a baggage car on defendant's road to ride to a place where the cars were being backed to make up a train. Defendant's rules forbade all persons, except certain employes, riding on baggage cars and directed baggagemen to rigidly enforce the rule. As plaintiff's evidence tended to show, defendant's baggageman ordered plaintiff off while the car was in motion. A pile of wood was near the track. Plaintiff replied that he could not get off because of the wood, whereupon the baggagemaster kicked him off, he fell against the wood and then under the cars and was injured. In an action to recover damages, *held*, that the fact that plaintiff was a trespasser was not a defence, and that the evidence was sufficient to authorize the submission of defendant's liability to a jury. *Id.*
  8. The court charged that if the brakeman acted "willfully and maliciously toward the plaintiff outside of and in excess of his duty" defendant was not liable. He refused to qualify this charge or to charge that it was sufficient to exempt defendant from liability that the act of the brakeman was willful. *Held*, no error. *Id.*
- As to whether servant, in action by him against railroad company for negligence, is chargeable with contributory negligence of master, *quære*. See NEGLIGENCE, 17.

— *Liability of sureties on bond given by employe to employer.*  
See PRINCIPAL AND SURETY, 4, 5.

MISTAKE.

1. Plaintiffs, on the seventeenth of April, accepted and paid to defendant a bill drawn upon them, which, before acceptance, had been altered by raising the amount. The bill had been deposited with the defendant, and the amount credited to the depositor; the forgery was not discovered until October fifth. In an action to recover back the money paid, *held* (MILLER, J., dissenting), that as defendant, in dealing with the bill or its avails, did not act upon the faith of any admission of plaintiffs, expressed or implied, as to the genuineness of the body of the instrument, or of any act or declaration on their part, but upon the apparent title and genuineness, and the responsibility of those from and through whom it received the bill, plaintiffs owed no duty to it in respect to the forgery, and that no negligence on their part could defeat their right of recovery. *White v. C. Nat. Bank.*  
316

2. Also, *held*, that regarding the case as one of mutual mistake in respect to which neither party was in fault, plaintiffs were entitled to recover. *Id.*

— *Findings and evidence, as to.*  
See ASSESSMENT AND TAXATION, 2, 4.

MORTGAGE.

1. A receiver authorized to execute upon payment formal satisfaction and discharge of mortgages in his hands as such officer, has authority to receive payment of the amount secured by and to satisfy a mortgage, although the same be not due at the time. *Heermans v. Clarkson.*  
171
2. A subsequent ratification by the mortgagor of a payment made by

a third person without his previous request is equivalent to an original authority to make the payment. *Id.*

3. An assignee of a mortgage takes it not only subject to all the equities existing between the parties to the instrument, but to the equities which third persons could enforce against the assignor. *Greene v. Warwick.*  
220
4. The provision of the recording act (1 R. S., 756, § 1), declaring every conveyance of real estate void, as against a subsequent *bona fide* purchaser of the same real estate, does not apply where two mortgages are executed at the same time, as neither one, although first recorded, is a subsequent conveyance. *Id.*
5. The only effect of recording the assignment of a mortgage is to protect the assignee from a subsequent sale of the same mortgage; if the assignment be not recorded, it is void as against a subsequent purchaser of the same mortgage. *Id.*
6. B. executed at the same time two mortgages on certain real estate, one to M. G., and one to D., which it was understood were to be equal liens and to be recorded at the same time. M. G.'s mortgage was first recorded, and after D.'s mortgage was recorded, was assigned to E. G., and by him assigned to W., both being *bona fide* purchasers for value, without notice of the circumstances. *Held*, that W. took his assignment, subject to all the equities as between M. G. and D., and could claim no priority of lien because of his mortgage being first recorded; that M. G. was not a subsequent purchaser within the recording act, and even if W. could, by virtue of his assignment, be regarded as a subsequent purchaser of some interest in the real estate, he could claim no preference under the statute, as D.'s mortgage was recorded before the assignments. *Id.*

7. Plaintiff and H., being the owners of a mortgage upon defendants' premises, and having obtained judgment of foreclosure and sale thereon, agreed with defendants to bid in the premises, advance money to pay off a prior mortgage and to convey to defendant R. E. B., defendants to execute a new bond and mortgage to them; the agreement was carried out. H. assigned his interest in the new bond and mortgage to plaintiff. Subsequently these were adjudged void for usury. In an action brought by plaintiff to be subrogated to the rights of the prior mortgagee and to foreclose the prior mortgage, *held*, that plaintiff and H., as junior incumbrancers, had, at the time of the usurious agreement, the right to pay the prior mortgage and to be subrogated; that this right was not destroyed by reason of entering into said agreement; but they were equitably entitled to the same benefits of the redemption as if made without such agreement, and by paying the debt they became entitled to a cession of the debt and a subrogation to all the rights of the mortgagee; and that the mortgage was to be regarded, as against the mortgagors, as still existing and uncanceled. *Patterson v. Birdsell*. 294
  8. Where the owner of premises conveyed to him subject to a mortgage, in ignorance of the lien thereon of a judgment against a former owner, subsequent to the mortgage, pays the mortgage, and causes the same to be satisfied of record, he is entitled to have the same reinstated as a lien prior and paramount to the lien of the judgment. *Barnes v. Mott*. 397
- MOTIONS AND ORDERS.
1. The Supreme Court at Special Term has power to vacate an order confirming the report of commissioners appointed to appraise the compensation for lands sought to be taken for railroad purposes, and thereupon to set aside the report and to appoint new commissioners; the owner is not confined to the remedy by appeal to the General Term given by the general railroad act. (§§ 17, 18, chap. 140, Laws of 1850.) *In re Application of N. Y. C. and H. R. R. Co.* 60
  2. Where cause is shown for thus setting aside the proceedings, the court is the judge of the sufficiency thereof, and the granting such relief is within its discretion, the exercise whereof may be reviewed by the General Term, but not in this court. *Id.*
  3. The report of commissioners may be set aside for misconduct, palpable error or accident on the part of the commissioners, such as would authorize the setting aside of a verdict or the report of a referee; and what would authorize a Special Term to excuse a default of a party and to set aside an inquest or a dismissal of a complaint taken at a Circuit, will empower it to vacate the order of confirmation. *Id.*
  4. An order of reference, under section 222 of the Code, to ascertain damages upon an undertaking given upon the granting of an injunction, cannot be regularly granted until judgment has been entered; but where the order is entered by plaintiff's consent this obviates the objection. *Lawton v. Green*. 326
  5. The final order in such proceedings should be limited to fixing the amount of damages, and a provision therein requiring the plaintiff to pay the same is improper. The amount of damages so ascertained is conclusive upon the parties and the sureties, but payment can only be enforced by action upon the undertaking. *Id.*
  6. A right to set off a judgment in favor of A. against B., against a judgment in favor of B. against A., cannot be asserted by motion on behalf of A., where it appears that before B.'s judgment was obtained he assigned his claim to a third person. If A. has any equities they can only be enforced by action, not by motion. *Swift v. Prouty*. 545



7. As to whether an order denying a motion to set off one judgment against another is reviewable here, *quære*. *Id.*

— *Order for examination of a party not reviewable in this court.*

*See PARTIES, 6.*

— *Order quashing habeas corpus reviewable on appeal, not on writ of error.*

*See PRACTICE, 1.*

### MUNICIPAL CORPORATIONS.

1. The legislature has not power to authorize a municipal corporation to issue its obligations for the purpose of raising money wherewith to pay a subscription of said corporation to the capital stock of a private corporation, and to provide for the payment of such obligations by taxation; it has not power to tax for private purposes solely. *Weismer v. Village of D.* 91
2. Accordingly, *held*, that the act (chap. 577, Laws of 1868) purporting to authorize defendant to subscribe for and take capital stock of the L. E. H. and M. Co., to issue its bonds to raise money to pay for such stock, and to collect by taxation the moneys to pay said bonds, was unconstitutional and void, and the bonds issued thereunder invalid. *Id.*
3. A municipal corporation is not estopped from asserting the invalidity of its bonds, by any conduct of its officers or agents, or by acts of acquiescence and approval on the part of the inhabitants of the municipality, after knowledge of the facts. *Id.*

— *Authority of municipal officers to contract, and the proper parties to action against officers.*

*See BUFFALO (CITY OF).*

*NEW YORK (CITY OF).*

*ROCHESTER (CITY OF).*

— *Ordinance of, regulating rate of speed of railroad trains, effect of as evidence of negligence.*

*See NEGLIGENCE, 18, 19.*

### MURDER.

1. An indictment setting forth a felony and then charging the killing of another by the accused while engaged in the commission thereof, is not void for duplicity. It charges but one offence, that of murder in the first degree, within one of the definitions of that offence in the act of 1873 (chapter 644, Laws of 1873), *i. e.*, the killing by a person while engaged in the commission of a felony. *Dolan v. The People.* 486
2. Where one breaks into a dwelling-house burglariously with intent to steal, he is engaged in the commission of the crime until he leaves the building with his plunder; and if, while engaged in any of the acts immediately connected with his crime, he kills a person resisting him, he is guilty of murder under said statute. *Id.*
3. It is not necessary in an indictment charging the crime of murder under said provision to allege that the killing was "without any design to effect death;" an allegation that it was willful and felonious is proper and sufficient. The object of the words quoted is to dispense with proof of a design to effect death, not to require proof that there was no such design. *Id.*

### NATIONAL BANKS.

— *Penalty for taking usurious interest.*

*See BANKS AND BANKING.*

### NEGLIGENCE.

1. A master is not responsible to an employe for the negligent act of a competent and proper foreman to whom there has been no delegation of power and control of the business or a branch thereof, but who is simply charged with special duties, performing them under the direction of the master, the latter retaining general control and supervision. *Malone v. Hathaway.* 5

2. It is only where the master withdraws from the management of the business, intrusting it to a middleman or superior servant; or where, as in case of a corporation, the business is of such a nature that the general management and control thereof is necessarily committed to agents, that the master can be held liable to a subordinate for the negligent acts of one thus acting in his stead. *Id.*
  
3. Defendant's firm was engaged in operating a brewery, the partners themselves personally superintending the business. They employed B., a competent and experienced carpenter to make examinations and repairs for the purpose of keeping the brewery in a safe condition. By the giving way of some joists or posts supporting a mash tub, which had become decayed, the tub fell, causing the death of plaintiff's intestate, a laborer in the employ of defendant's firm. New and proper supports had been put in about eleven months before the accident. The decay was not visible, and no evidence was given that defendant or his partner knew or ought to have known that the supports were defective. The court submitted the case to the jury upon the question as to whether there was negligence on the part of B. in omitting to examine and keep the building in repair, ruling, in substance, that if such negligence was found defendant was liable. *Held* (CHURCH, Ch. J., and RAPALLO, J., dissenting), error; that for such negligence defendant was not liable, in the absence of evidence of any neglect or omission of duty on the part of his firm. *Id.*
  
4. Plaintiff, a child five years old, resided with his mother on the first floor of a tenement-house communicating directly by a flight of stairs with the street. Plaintiff had been playing in the back yard, and came in for a drink of milk, which the mother gave to him, and he sat down at a table to drink it. She went into a bed-room adjoining, leaving the door open and telling him to go back into the yard. The door leading to the street was open. He went out on to the street, and in five minutes from the time his mother left him was run over and injured by one of defendant's cars, through the negligence of the driver. The mother testified that she had never known him to go out into the street alone before. In an action to recover damages for the injury, *held*, that the evidence did not establish contributory negligence on the part of the mother, as matter of law; but that it was a question of fact, and properly submitted to the jury. *Fallon v. C. P. N. and E. R. R. Co.* 13
  
5. A contractor for the erection of a building who subcontracts a portion of the work and reserves no control or authority over or right to direct as to the manner of performance, save generally to insist that the work be done according to the terms of the subcontract, is not liable to a third person for an injury caused by the negligent act of the subcontractor. *Slater v. Mercereau.* 138
  
6. Where separate and independent acts of negligence of two parties are the direct causes of a single injury to a third person and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury; and this, although his act alone might not have caused the entire injury, and although without fault on his part, the same damage would have resulted from the act of the other. *Id.*
  
7. Defendant contracted to erect a building on land of A. & Co., the work to be done under the direction of an architect named. Defendant subcontracted the mason work to B. & M., who contracted to cut, when directed, a recess in the wall to receive a waste pipe to convey water from the roof to a sewer. B. & M. not having received directions did not cut the recess after the roof was on, and in consequence the water from the roof, during a rain storm, ran into the cellar where it was joined by water from the street, let in



through the negligence of B. & M. in constructing an area in front of the building. The water found its way through the walls into plaintiffs' building adjoining, injuring their goods. In an action to recover damages for the injury, *held*, that the power given to the architect for the protection of the owner to direct was simply as to the fitness of the materials and the manner the work was done, not as to the time; that it was defendant's duty to direct the necessary work to be done to convey off the water from the roof, and it was negligence on his part in failing to do so in proper time; that he was not liable for the negligence of B. & M. in constructing the area, but as their acts of negligence and his own united to cause the injury he was properly held liable for the whole.

*Id.*

8. In an action to recover damages for an injury resulting from a collision, between plaintiff's carriage and one alleged to belong to defendant, through the negligence of the coachman driving the latter, the principal question on the trial was as to whether the carriage belonged to defendant or his daughter, to whom defendant claimed to have sold it and the horses. It was not claimed by defendant that the employment of the coachman was separate from the ownership of the carriage and horses, and the evidence showed them inseparably connected. The court charged that, if defendant did not own the carriage and horses, no recovery could be had. Defendant's counsel requested him to charge that if the jury find the coachman was not the servant of the defendant but of the daughter, they could not find for plaintiff. The court remarked that he did not see how he could separate the two things on the evidence, and said counsel excepted to the refusal to charge as requested. *Held*, that the remark could not be construed as a refusal to charge the request as a legal proposition, but only that as a question of fact; the ownership of the carriage and horses and the employment of the

coachman could not be separated, and that the form of the exception did not change the effect of the decision. *Sloane v. Ellmer.* 201

9. It is the duty of a common carrier, not only to transport, but to deliver or offer to deliver, goods to the consignee within a reasonable time. Where the consignee is unknown, a reasonable and diligent effort to find and notify him of the arrival is a condition precedent to a right to warehouse the goods. If such effort be not made the carrier is liable for the damages resulting from the neglect. *Sherman v. H. R. R. Co.* 254
10. The measure of damages is the difference in the value of the goods at the time and place they ought to have been delivered and the time of their actual delivery; in fixing the time when delivery should have been made, where there is no charge of negligence in transportation, a reasonable time after arrival should be allowed for delivery. *Id.*
11. In the case of the transportation of property over several railroads constituting a connecting line, neither company is agent of the owner; each exercises an independent employment as a contractor with the owner and is responsible for its own negligence, and it cannot make the owner responsible for the negligence of a connecting road. *Id.*
12. *It seems*, that if, in an action for negligence, tried by a referee, an express finding of fact that defendant was guilty of negligence is necessary to uphold a judgment, a finding to that effect, although included in the conclusions of law, is sufficient. *Id.*
13. Certain bales of cotton owned by plaintiffs were shipped at C., consigned to "Byron Sherman," New York. They were delivered to defendant at A., by a connecting line, with a freight bill in which was stated the number of and the marks upon the bales, but the consignee's name was given as "Ryan Sherman." The cotton was trans-

ported by the defendant to New York; the name of the consignee was changed by it in its entries and bills to "Ryan & Sherman." Not finding such a firm defendant warehoused the cotton. Byron Sherman called at defendant's freight office in New York, about the time of the arrival of the cotton, and several times thereafter, with the bill of lading containing the number of bales and marks thereon which he exhibited, and inquired for the cotton, but could obtain no information. In an action for negligence, *held*, that plaintiff was entitled to recover; that the evidence was sufficient to justify a finding that the delay and consequent injury was caused solely by defendant's mistake; that while defendant was only chargeable with its own negligence plaintiff could not be made responsible for the negligence of the connecting line.

*Id.*

14. Under the provisions of the innkeepers' act of 1866 (chapter 658, Laws of 1866), exempting an innkeeper from liability for the loss by fire of property of a guest in a barn or outbuilding, where it shall appear that the loss was the work of an incendiary, and occurred without negligence on his part, the burden is upon the innkeeper to show that the fire was an incendiary one, and to show absence of negligence on his part. *Faucett v. Nichols.* 377

15. In an action to recover for such a loss, evidence was given tending to show that the fire was the work of an incendiary, who gained access to the hay loft, where the fire was set, through a window opening into an alley. The window was left open and lumber was piled against the barn so that a person could easily climb upon it and enter the window. The court submitted to the jury the question whether leaving the window open was negligence, charging that if so, and it contributed to occasion an incendiary firing, defendant was liable. *Held*, no error; that the facts proved, although not strong, were some evidence of negligence sufficient to authorize the submis-

sion of the question to the jury; and that the negligent omission by an innkeeper to take reasonable and prudent precaution to guard against an incendiary fire was such negligence as would deprive him of the benefit of the act. *Id.*

16. Negligence, which precedes and facilitates the commission of the crime, is as much within the statute as the negligent omission to protect and remove the property after discovery of the fire. *Id.*

17. In an action to recover damages for the alleged negligent killing of plaintiff's intestate at a railroad crossing, the evidence showed that there were obstacles intercepting the view of the track from the highway upon which the deceased was approaching the crossing; and S., the employer of the deceased, who was in the wagon with him and was driving, testified that he looked in both directions and did not see the approaching train, which was moving very rapidly. Defendant's testimony tended to show that from a point on the highway, 150 or 160 feet from the track, a train could have been seen for some distance. Defendant's counsel requested the court to charge that there being no evidence affirmatively showing that the deceased either looked or listened or did any thing to guard against the dangers of the crossing, it was to be presumed that he did not look and was negligent. The request was refused. *Held*, no error; that the presumption was simply one of fact, and that the question of contributory negligence was properly left to the jury. *Massoth v. D. and H. C. Co.* 524

18. It does not necessarily follow from the fact that a skilled engineer can demonstrate that, from a given point in a highway, the track of a railroad is visible for any distance, that an individual in charge of a team approaching the track is negligent, because from the point specified he does not see a train approaching at great speed in time to avoid a collision. *Id.*

19. As to whether, in such a case, a servant riding with his master, who is driving, is chargeable with his master's negligence, *quære. Id.*

20. Irrespective of any ordinance or law regulating the speed of railroad trains at crossings, the running at an excessive rate of speed is negligence, and if a collision is caused thereby, the company is liable. As to whether the rate of speed is excessive or dangerous in the locality, is a question of fact for the jury. *Id.*

21. Whether the violation of a municipal ordinance regulating the rate of speed is, as matter of law, negligence, *quære. Id.*

22. Ordinary care and prudence may require the giving of signals from an approaching train, to warn persons lawfully upon the track, and the omission to do so when so required will subject the corporation to liability for injury caused by the omission; but unless it is at a highway crossing in respect to which the statutory duty exists, the omission to give the designated signals is not negligence as matter of law, but the question of negligence is one of fact for a jury. *Cordell v. N. Y. C. and H. R. R. Co.* 535

— *When question of fact.*  
*See Haycroft v. L. S. and M. S. R. R. Co.* (Mem.) 636

— *When question of law.*  
*See Mitchell v. N. Y. C. and H. R. R. Co.* (Mem.) 655

# NEW YORK (CITY OF).

1. The provision of the act of 1869, providing for the support of the government of the city of New York (chap. 875, Laws of 1869), which requires the mayor and comptroller to designate newspapers in which to publish the proceedings of the board of supervisors and proceedings relating to county affairs, does not include proceedings of the board of canvassers for the city and county of New York, and there is no repugnancy between that provision and the statutory regulations for the

publication of the proceedings of election boards (§ 11, title 5, chap. 130, Laws of 1842). (MILLER and EARL, JJ., dissenting.) *Hankins v. The Mayor, etc.* 18

2. Accordingly *held* (MILLER and EARL, JJ., dissenting), that the power given to the boards of county canvassers to designate the papers in which the results of the elections shall be published, was not taken away from the board of canvassers of the city and county of New York by said provision of the act of 1869; and that other than the official papers having been designated, in 1870, by the board, the city corporation was liable for the expense of the publication. *Id.*

3. Under the provision of the act of 1873 to reorganize the local government of the city of New York (§ 76, chap. 335, Laws of 1873), providing for investigations as to the origin of fires in the city, the fire marshal has all the power as to such investigations conferred upon the superintendent of police by the act of 1852 (§ 1, chap. 332, Laws of 1852), as amended in 1857 (§ 37, chap. 569, Laws of 1857), and also the authority conferred upon the metropolitan fire marshal by the act of 1868 (chap. 563, Laws of 1868). *Harris v. The People.* 148

4. The fire marshal has jurisdiction under said statutes to institute an investigation as to the circumstances of a fire in the city without a complaint being made to him. The only fact necessary to call into exercise his jurisdiction is that the fire has occurred. *Id.*

5. In proceedings to vacate an assessment for constructing a sewer in Ninety-first street, New York, it appeared that the petitioner being the owner of lands between Ninth and Tenth streets, conveyed a portion thereof bounded "north-easterly by the center line of Ninety-first street," subject to a right of way over the portion of said street so conveyed. The assessment was claimed to be invalid, because the corporation had

- not acquired title to the land of said street. *Held*, untenable; that it was not to be assumed, in the absence of proof, that the sewer was laid upon the petitioner's half of the street, or in the center thereof, and that a party, to avail himself of such an objection, must show affirmatively that his rights have been invaded; that as to the other half of the street, a permission from the owners would be sufficient to authorize the construction of the sewer, and it not appearing that any such permission was not given, or that the owners objected, the legal presumption was that permission was given; but that, if no consent was given, it was not a valid ground of objection that a trespass had been committed upon the lands of another. *In re Ingraham*. 310
6. Also, *held*, that it was not lawful to include in one contract the construction of two sewers disconnected with each other, but to be built in accordance with the plan adopted for sewerage in the district; and that it was proper to assess the expense thereof in one assessment. *Id.*
7. A challenge to the array of petit jurors, at a Court of General Sessions for the city and county of New York, alleged that the jurors were not selected by the commissioner of jurors of said county, and that neither he nor any one on his behalf attended the drawing; but that the jurors were selected by one appointed by the mayor as commissioner, and that the statute under which the mayor acted was unconstitutional. *Held*, that the challenge showed upon its face that the jury were selected by an officer *de facto*, whose acts, in the exercise of the functions of the office, were valid as to the public, and whose appointment could not be questioned collaterally; and that therefore a demurrer to the challenge was properly sustained. *Carpenter v. The People*. 483
8. Under the charter of the city of New York of 1873 (chap. 335, Laws of 1873) the common council have authority to take leases of real estate for the benefit of the city, and to determine what property shall be leased, and for what period, subject to the limitations and restrictions of said charter. *People ex rel. v. Green*. 499
9. This authority is not limited to the taking of such leases as are provided for by appropriations. The provision of said charter prohibiting the incurring of expenses not thus provided for (§ 89), has reference to the expenditures of the several departments, not to the action of the common council in leasing property deemed by it to be required for city purposes. *Id.*
10. In a return to a writ of alternative mandamus directed to the comptroller requiring him to lease from relators certain premises as authorized and directed by the common council, or to show cause, etc., the comptroller alleged, in substance, that there was no sufficient appropriation to pay the rent. *Held*, that he was estopped from claiming that it was not his duty to execute the lease, and that the common council had no authority to require him to do so, as he had not based his refusal or his defence to the writ upon that ground. *Id.*
11. *It seems*, however, that the common council has power to authorize and to require the comptroller to supervise the taking of a lease and to execute it on behalf of the city. *Id.*
12. The provision of said charter (§ 15), making the signature of the clerk of the common council necessary to all leases, etc., refers only to leases from the city corporation, and does not include those to it. *Id.*
13. The provision of the act of 1852, "to make permanent the grade of the streets and avenues of the city of New York" (§ 3, chap. 52, Laws of 1852), requiring an assessment of damages to the owners of lots fronting on a street or avenue in said city, in all cases where the grade thereof shall be changed,

has not been repealed by subsequent legislation; it is applicable, irrespective of the authority changing the grade; and therefore such owners are entitled to damages for a change of grade made by the commissioners of the Central park. *People ex rel. Tytler v. Green.* 606

— *When alleged irregularities in drawing grand jurors not ground for plea in abatement to indictment.*

See INDICTMENT, 5, 6, 7.  
TOWN BONDING.

### NEW TRIAL.

In an action to recover damages for breach of contract, where plaintiff has recovered judgment allowing one item of damage claimed and rejecting another, he cannot retain the amount allowed and ask upon appeal for a retrial as to the item rejected; if a reversal and new trial is granted, it must be of the entire judgment and claim. *Wolstenholme v. W. F. M. Co.* 272

### NOTICE.

1. One who seeks to establish a right in hostility to a recorded title to or security upon land, under and by virtue of a prior unrecorded conveyance or prior equities, must show actual notice to the subsequent purchaser of his rights, or prove circumstances such as would put a prudent man upon his guard and from which actual notice may be inferred and found. *Brown v. Volkening.* 76
2. The possession which will be equivalent to actual notice to a subsequent purchaser must be an actual, open and visible occupation, inconsistent with the title of the apparent owner by the record, not equivocal, occasional or for a special or temporary purpose. Constructive possession will not suffice. *Id.*
3. The principle of constructive notice will not apply to an uninhabited and unfinished dwelling-house. (FOLGER, J., dissents.) *Id.*

4. One F. transferred to plaintiff by deed in trust, among other things, a demand against defendant for money loaned. F. subsequently brought suit against plaintiff to set aside the trust, in which action defendant was sworn as a witness. Plaintiff succeeded in the litigation. In an action upon the claim defendant proved payment to F. Plaintiff requested the court to charge that the pendency of said action brought by F. was constructive notice to defendant of the existence of the trust deed. The court refused so to charge. *Held*, no error; that whether defendant had notice of the character of the action sufficient to put him upon inquiry was a question of fact for the jury. *Heermans v. Ellsworth.* 159

### NUISANCE.

1. Slight inconveniences and occasional interruptions in the use of a highway or navigable stream, which are temporary and reasonable, are not illegal merely because the public may not, for the time, have the full use of the highway or stream. *People v. Horton.* 610
2. If a craft of any kind is adapted for use in any employment for which a canal may lawfully be used, and is actually employed in a business lawful in itself, and does not in the conduct of such business unreasonably or unnecessarily obstruct the navigation of the canal by other vessels, a court of equity will not forbid the use of the craft in such employment; and this, although some obstruction to the free passage of vessels necessarily results from the peculiar employment. *Id.*
3. Defendants were the owners of a floating elevator, which was used by them in the "Buffalo City Ship canal" (an artificial channel, forming part of the harbor of that city), for the purpose of transferring grain in bulk from lake vessels to canal boats, moving from place to place as required.



When not in use it was moored opposite lands owned by defendants. The channel of the canal is 160 feet wide. When employed in unloading a vessel, with the vessel on one side and a canal boat on the other, the three crafts occupy less than eighty feet of the channel, and a transfer of the load of a vessel is made in a few hours. Vessels moving in the canal are moved by steam power. In an action by the attorney-general in behalf of the people, a judgment was rendered restraining such use, but allowing the use of the elevator for unloading vessels aground or for any other purpose. *Held*, error; that the use was not an unnecessary, unreasonable and unlawful use of the canal, or an unreasonable and unlawful obstruction to trade and commerce, but was in aid of commerce. *Id.*

4. Defendant offered to prove on the trial that the use of their elevator lowered the price for transferring grain, and induced trade which would otherwise have gone to foreign ports, which evidence was excluded. *Held*, error, as the question was directly presented whether the slight obstruction resulting from the use of the elevator was not more than balanced by the public benefit. *Id.*

#### ORDER.

Where a party, for a valuable consideration, gives to another an order payable out of a fund not then in existence, such party cannot, by his own default, prevent the creation or realization of the fund and interpose the absence or failure of the fund as a defence to an action upon the order; so where an order is drawn upon a fund, to be paid upon the happening of a certain condition, which order is accepted, the acceptor cannot, by his own act, defeat the condition and then set it up as a defence in an action upon the acceptance. *Risley v. Smith.* 576

#### PARTIES.

1. An assignee for the benefit of creditors of an insolvent copartnership, the representatives of a deceased partner, and the surviving partners may properly be joined as parties defendant, and an action may properly be brought against them by a creditor of the firm, to compel the assignee to account and pay over to plaintiff his share of the proceeds of the partnership property, and (it being alleged in the complaint that the surviving partners are insolvent) to recover of the representatives the balance of plaintiff's claim. (ALLEN and EARL, JJ., dissenting). *Haines v. Hollister.* 1
2. *It seems*, it is not necessary in such an action that the other creditors should be made parties, or that the action should be brought in their behalf. *Id.*
3. Even if it were necessary, when it does not appear upon the face of the complaint that there are other creditors, this is not a good ground for demurrer. *Id.*
4. One asserting a right under a mortgagor prior to the mortgage, is a proper party to an action for foreclosure of the mortgage and the question of priority is proper to be determined in the action. *Brown v. Volkening.* 76
5. Under section 391 of the Code, a plaintiff in an action pending may examine the adverse party on oath before service of the complaint, and for the purpose of obtaining facts on which to frame the complaint. *Glennoy v. Stedwell.* 120
6. If the affidavit presented to a judge for the purpose of procuring an order for such examination, discloses a case giving the judge power to act, his action is discretionary and cannot be reviewed here. *Id.*
7. The effect of said provision cannot be altered by a rule of the court. *Id.*

8. Where separate and independent acts of negligence of two parties are the direct causes of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury; and this, although his act alone might not have caused the entire injury, and although without fault on his part, the same damage would have resulted from the act of the other. *Slater v. Mersereau.* 138

9. Where the owner of a mortgage has pledged the same as collateral security for a debt less than the face of the mortgage, he has an interest in the same which entitles him to bring an action for the foreclosure of the mortgage. In such action the pledgee is a necessary party, but it is immaterial as far as the mortgagor or other parties in interest are concerned whether he is made a plaintiff or defendant. *Simson v. Satterlee.* 657

— *Holder of legal title proper party to bring ejectment, although equitable title in another.*

*See EJECTMENT, 12.*

— *When action cannot be prosecuted by tax-payer against officers of a municipal corporation under act chapter 161, Laws of 1872.*

*See ROCHESTER (CITY OF), 2.*

— *When next of kin instead of personal representatives are proper parties to bring action for conversion of property of estate.*

*See WILLS, 5.*

— *When action by tax-payer to enjoin payment of city bonds not maintainable.*

*See Comins v. Board of Supervisors. (Mem.)* 626

## PARTNERSHIP.

1. An assignee for the benefit of creditors of an insolvent copartnership, the representatives of a deceased partner, and the surviving partners may properly be joined as parties defendant, and an action may properly be brought against them by a creditor of the firm, to compel the assignee to

account and pay over to plaintiff his share of the proceeds of the partnership property, and (it being alleged in the complaint that the surviving partners are insolvent) to recover of the representatives the balance of plaintiff's claim. (ALLEN and EARL, JJ., dissenting.) *Haines v. Hollister.* 1

2. *It seems*, it is not necessary in such an action that the other creditors should be made parties, or that the action should be brought in their behalf. *Id.*

8. Even if it were necessary, when it does not appear upon the face of the complaint that there are other creditors, this is not a good ground for demurrer. *Id.*

4. Where one engaged in business enters into a copartnership with another for the purpose of continuing the business, and transfers its assets to the firm in consideration of an agreement of the firm to assume and pay certain specified debts incurred in the business, and to apply the assets first to the payment of said debts, the agreement is to be deemed as made for the benefit of the creditors holding the claims specified, and an action may be maintained by such a creditor against the firm upon such agreement. *Arnold v. Nichols.* 117

5. An allegation in such an action, in the answer of the partner, that he was induced to enter into the agreement by the fraud of the original debtor in the absence of allegations that he has rescinded the agreement on account of the fraud, or has sustained damages by reason thereof, does not authorize evidence of the fraud upon the trial. *Id.*

6. One who purchases the interest of a partner in a firm acquires simply a right to an accounting in respect to the partnership effects and to a share of the surplus remaining after payment of the partnership debts, deducting any balance that may be due from the vendor to his copartners upon an accounting. *Morss v. Gleason.* 204

7. Where a member of a firm transfers his interest therein to a third person, who is received into the firm as a partner in his stead, he thereafter occupies the position simply of surety for the firm debts to the extent that the assets of the firm are sufficient for their payment. Such assets are held by the new firm, charged with a trust for the payment of the debts of the old firm. *Id.*
8. M., R. and G. were partners. G., with the consent of his copartners, sold out his interest to B., who assumed all the liabilities of G. as a partner, and was received into the firm in his stead. The wife of G. at the time held a note made by the firm. M. & R. subsequently acquired the interest of B. At the time of these transfers the firm property was sufficient to pay all its debts. G. procured the note, then past due, and transferred it to M. in payment of a debt due to M. individually. M. transferred the note to plaintiff. In an action upon the note, *held*, that M., upon acquiring title to the note *eo instanti* acquired a right to a credit as between him and his partner for its amount as so much paid upon a partnership debt; that he could not have maintained an action against G., either upon the note or for a contribution, at least until he had first exhausted the partnership assets and shown a deficiency; and that as plaintiff took it subject to all the equities existing against it in the hands of M., he could not recover. *Id.*
9. Real estate purchased for and appropriated to partnership purposes and paid for out of partnership funds is partnership property, although the legal title is taken in the name of one of the partners; equity will hold him as trustee for the firm. *Fairchild v. Fairchild*. 471
10. There is no distinction in respect to the proof necessary to establish the fact that the real estate is partnership property between such a case and the case of a conveyance to the several partners; it may be established in either case by parol evidence. *Id.*
11. The fact that in the firm accounts the land is treated the same as other firm property as to purchase-money, income, expenses, etc., is a controlling circumstance in determining the intent, and from it an agreement may be inferred. *Id.*
12. For the purpose of paying debts and adjusting the equities between the copartners real estate belonging to a partnership is treated as personal property, and what remains is regarded as real estate descending to the heirs of the partners, according to their several interests. *Id.*
13. The same evidence, however, which will establish its character as partnership property for the purpose of paying the debts and adjusting the equities, will determine it for the purpose of final division. *Id.*
14. Real estate so purchased is not within the provision of the statute of uses and trusts (1 R. S., 728, § 51), providing that when a grant for a valuable consideration shall be made to one person and the consideration paid by another, no use or trust shall result in favor of the person making the payment; the partner having title is a trustee for the firm, holding the property as personalty, and when this trust is discharged by the payment of the debts and the settlement of the claims of the partners as between themselves, a trust in the remainder results, by operation of law to the other members of the firm and the heirs of such as have died, which is validated by the provision of the said statute (§ 50) preserving trusts arising or resulting by implication of law. *Id.*
15. Where it appears that a partner who has taken title in his own name to real estate claimed to belong to the firm has access to the books which were kept by clerks, that he examined them at times and had personal supervision of the office, it is to be presumed that



he knew how the entries were made, and they are competent evidence against him. *Id.*

16. *It seems*, that, as a general rule, where members of a firm have access to its books, and opportunity to know how their accounts are kept, such knowledge on their part will be presumed. *Id.*

17. In order to establish payment of money out of partnership funds upon claims against real estate so deeded to one of the members, evidence that mortgages have been so paid is competent without production of the mortgages; they are to be regarded simply as collateral to the principal fact. *Id.*

#### PAYMENT.

1. It is the duty of an assignee of a non-negotiable chose in action, in order to protect himself against a payment by the debtor to the original creditor, to notify the former of the assignment; and in an action upon the demand where such a payment is established, the burden of proving notice prior to payment is upon the plaintiff. *Heermans v. Ellsworth.* 159
2. Defendant made his promissory note for the accommodation of the firm of Lambert & Lincoln, who procured it to be discounted and the proceeds were passed to their credit. Before the note matured Lincoln wrote to plaintiff to take up the note and to furnish money for that purpose. Plaintiff sent the money to Lincoln, who placed it in bank to his individual credit, and on the day the note fell due took up the note with his individual check. He did not assume to act for plaintiff or ask to have the note transferred to any one. He asked to have the note protested so that he could hold the indorser and maker after protest. He sent the note to plaintiff. In an action upon the note, *held*, that plaintiff did not take title from the bank but from Lincoln, and subject to any defence against it in the hands of the latter; that the bank could not be made a

seller without its knowledge or consent and did not transfer the note but only took payment; and that plaintiff could not recover. *Lancey v. Clark.* 209

8. Plaintiff's complaint alleged, in substance, that certain bonds belonging to the estate of S., of whose will he was surviving executor, came into defendant's hands as the personal representative of M., a deceased executor, which they refused to deliver up unless plaintiff would pay an unjust claim for commissions, which was disputed by plaintiff, but which he paid in order to obtain the bonds. Defendant's answer, alleged, among other things, that an account containing charges for the commissions claimed was delivered to plaintiff at his request, examined by him and admitted to be correct. This allegation, after plaintiff had given evidence that he had always disputed the claim, defendants offered to prove on trial. The offer was rejected. *Held*, error; that the averment in the complaint that the claim was unjust and was disputed was necessary in order to show that the payment was involuntary; and it being put in issue, defendant was entitled to the evidence offered as relevant to that issue. *Scholey v. Mumford.* 521

#### PENALTY.

— *For taking usury, by banks, what recoverable.*

See BANKS AND BANKING, 1, 2, 4.

#### PERJURY.

— *Sufficiency of indictment for.*  
See INDICTMENT, 1, 2, 3.

#### PLEADING.

1. Where a complaint contains, in one count, two causes of action, which cannot be properly united in the same action, the omission to state them in separate counts

- does not deprive defendant of his right to demur. *Wiles v. Suydam*. 173
2. A complaint setting forth facts sufficient and seeking to charge defendant as a stockholder of a manufacturing corporation, organized under the general laws (chap. 40, Laws of 1848), with a debt of the corporation, because of a failure to make and record the certificate required by said act (§ 10), and also alleging the requisite facts, and seeking to charge him, as trustee, with the debt, because of failure to file an annual report (§ 12), contains two separate and distinct causes of action which cannot properly be united. *Id.*
  3. The first cause of action is one upon contract, the second is an action upon a statute for a penalty or forfeiture. *Id.*
  4. The two causes of action do not arise out of the same transaction or transactions connected with the same subject of action, within the meaning of section 167 of the Code. *Id.*
  5. A plea in abatement to an indictment is to be strictly construed; it must be drawn with precision and accuracy, and must be certain to every intent. *Dolan v. The People*. 485
  6. A plea in abatement to an indictment found at a Court of General Sessions in the city of New York alleging that the annual grand jury list was not wholly selected, as required by statute (chap. 493, Laws of 1853), from the petit jury lists made out by the commissioner of jurors, without any averments of fraud or design, is not good. The fact that a few names not appearing on the petit jury lists are accidentally put upon the grand jury lists does not vitiate the whole list, and that it was by accident or oversight is to be presumed in the absence of allegations of fraud or design. *Id.*
  7. Nor is it a good plea that some one of the fifty selected as the special panel of grand jurors (§ 28, chap. 539, Laws of 1870), was not upon the petit jury lists, in the absence of an allegation that the persons actually sworn and impaneled were not upon that list. It is necessary, also, in such a plea, to give the names of the persons alleged to have been selected and drawn who were not upon the petit jury lists. *Id.*
  8. It is not a good plea that the commissioner of jurors was prevented by duress from attending upon or supervising the grand jury. In the absence of allegations as to how the grand jury was drawn and by whom, it is to be presumed that the drawing was made by some other person claiming the office, acting as *de facto* commissioner, and recognized as such by all the officers having relations with him or his work; and a jury drawn by a *de facto* commissioner is regular. *Id.*
  9. It is within the discretion of the court of original jurisdiction whether, upon overruling a demurrer by defendant, he shall be allowed to answer over. *Simson v. Satterlee*. 657
    - *When demurrer for non-joinder of parties not sustainable.*  
See PARTIES, 3.
    - *When allegation of fraud insufficient to allow proof.*  
See PARTNERSHIP, 5.

## POSSESSION.

Where a parol contract for the sale of vacant land is silent as to possession, and the vendee has paid the entire consideration and fully performed on his part, and all that remains for the vendor to do is to give a deed, in the absence of any evidence to the contrary, there is an implied agreement or license that the vendee may at once take possession and have the use of the land. *Miller v. Ball*. 286

— *Actual, not constructive, necessary to serve as notice of unrecorded conveyances to subsequent purchaser.*

See NOTICE, 1, 2,

— *When question of fact.*

See TRIAL, 3.

POSSESSION (WRIT OF).

See WRIT OF POSSESSION.

PRACTICE.

1. An order quashing a writ of *habeas corpus* can only be reviewed upon appeal. A writ of error will not lie in such case. *People ex rel. v. Conner.* 481
2. Where, upon the return of an order to show cause why a mandamus should not issue, the relator takes no issue upon the allegations of the affidavits and papers presented by defendant, but proceeds to argument and asks for a peremptory writ; this is equivalent to a demurrer, *i. e.*, it is an admission of the truth of those allegations, as statements of facts, but a denial of their sufficiency in law to prevent the issuing of the writ, and if the papers set forth facts showing the relator not entitled to the relief sought, the writ cannot be granted. *People ex rel. Tenth Nat. Bank v. Board Apportionment.* 627
3. Where a party has a remedy by action, relief by mandamus will be denied. *Id.*

PRESUMPTIONS.

1. A will regularly admitted to probate can only be impeached for incapacity of the testator by reason of nonage or imbecility; competency will be presumed until the contrary is shown. *Howard v. Moot.* 262
2. *It seems*, that, as a general rule, where members of a firm have access to its books, and opportunity to know how their accounts are kept, such knowledge on their part will be presumed. *Fairchild v. Fairchild.* 471

— That license was given to lay sewer, when one of law.

See ASSESSMENT AND TAXATION, 3.

— That parties contracting as to lots, had in contemplation a map.

See CONTRACTS, 1.

— When one of fact.

See NEGLIGENCE, 15.

— Intent to create express trust will not be presumed when purpose can be accomplished under a power.

See TRUSTS AND TRUSTEES, 5.

PRINCIPAL AND AGENT.

1. An executory contract under seal for the purchase of lands, executed by the vendee in his own name, cannot be enforced as the simple contract of another not mentioned in or a party to the instrument, on proof that the vendee named had oral authority from such other to enter into the contract, and acted as his agent in the transaction; at least in the absence of proof of some act of ratification on the part of the undisclosed principal. *Briggs v. Partridge.* 357
2. *It seems*, that in case of a simple contract the rule is otherwise and the principal is bound. *Id.*
3. In an action for assault and false imprisonment, it appeared that plaintiff was the confidential clerk and agent of defendant, having charge of his business in New York, with power of attorney, authorizing him to sign and indorse checks, notes, etc. After receiving notice that his services were not required for another year, he, without defendant's knowledge, drew from the bank \$4,000 on a check signed by him in defendant's name and deposited the same, receiving a certificate of deposit payable to his own order. Defendant was indebted to plaintiff at the time about \$3,800, and, as the latter alleged, he drew the check to pay the sum owing him. On being advised of this, defendant went to his office in New York and demanded the money, and upon plaintiff's refusal to restore it, discharged him. Plaintiff thereupon took from the safe the certificate of deposit and certain negotiable warehouse receipts belonging to defendant, and, without the knowledge of the latter, carried them away. Defendant, being advised of the fact, sent for an

officer, and on plaintiff's return and refusal to surrender the papers, the arrest complained of was made. The court was requested to charge the jury that there was no justification for plaintiff's possession of the warehouse receipt, to which the court responded: "The private rights of these parties are not before the jury." *Held*, error; that the charge requested should have been given, and the proposition stated was erroneous; that the facts were proper to be taken into consideration as bearing upon defendant's motive. *Voltz v. Blackmar*. 646

4. Also, *held*, that the act of plaintiff in drawing the money was unauthorized and unjustifiable; that the power of attorney gave him no authority to adjust his account or to draw defendant's money to pay a debt due to himself. *Id.*

5. An agent cannot act in matters touching his agency so as to bind his principal where he has himself an adverse interest. *Id.*

— *When acts of agent bind principal.*

*See* INSURANCE (FIRE), 1, 3.

— *Condition in policy, when cannot be waived by local agent of insurer.*

*See* INSURANCE (FIRE), 8.

— *When insurance company estopped by acts of its agent from alleging breach of warranty.*

*See* *Baker v. Home L. Ins. Co.* (Mem.) 648

#### PRINCIPAL AND SURETY.

1. An offer upon the part of a principal debtor to pay, and an omission so to do because of a request of the creditor that he retain the money, and the subsequent insolvency of the principal, does not discharge a surety. *Clark v. Sickler*. 231

2. The act which will discharge a surety must be legally injurious or inconsistent with his legal rights; mere indulgence is not sufficient. *Id.*

3. An omission of duty on the part of the creditor and a consequent injury, will not discharge the surety unless he has requested the performance of the duty. *Id.*

4. The sureties upon a bond given by an employe to his employer, conditioned that the former will faithfully account for all moneys and property of the latter coming to his hands, are not discharged from subsequent liability by an omission on the part of the employer to notify them of a default on the part of their principal known to the employer, and a continuance of the employment after such default, in the absence of evidence of fraud and dishonesty on the part of the employe. *A. and P. T. Co. v. Barnes*. 385

5. *It seems*, that the rule is otherwise where the default is of a nature indicating want of integrity in the employe, and this is known to the employer. *Id.*

6. Where lands incumbered by a judgment are conveyed with covenants of warranty to a purchaser for full value, the grantee and his successors in interest occupy a position similar to that of sureties for the judgment debtor and are entitled to the same equities. A release by the judgment creditor without their consent and with knowledge of their rights of any security to which, in equity, they would be entitled on payment of the judgment, discharges the lien of the judgment. *Barnes v. Mott*. 397

7. Accordingly *held*, where, after such a conveyance, the judgment debtor gave an undertaking on appeal from the judgment securing the amount thereof and staying proceedings to enforce the same, and after affirmance of the judgment the judgment creditor, with knowledge of the equitable rights of the owner and without his consent, released the sureties in the undertaking, that thereby the lien of the judgment was discharged. *Id.*

8. *It seems*, that the same principle would apply without regard to the covenants in the deed. *Id.*
9. It is competent under the Code for one of two makers of a promissory note, in an action upon the note, to prove by parol that he signed the note as surety, to enable him to interpose as a defence that he was discharged by an extension of time given to the principal with knowledge of the suretyship. *Hubbard v. Gurney.* 457
10. Such evidence does not alter or vary the written contract, as the fact proved simply operates, when knowledge of it is brought home to the creditor, to prevent him from changing the contract or making a different one with the principal debtor without the consent of the surety, or from impairing the rights of the latter by releasing any security or omitting to enforce the contract when requested. *Id.*
11. The authorities upon the question as to the competency and effect of such evidence collated and discussed. *Id.*
12. After the maturity of a note signed by defendant, as surety, and held by plaintiff, who had knowledge of the suretyship, the principal debtor executed a new note which was indorsed by plaintiff, discounted and the avails paid to him; when the note matured a small payment was made by the principal and a new note given. In an action upon the original note, *held*, that there was an implied agreement to extend the time of payment, which, being done without the knowledge or consent of defendant, discharged him from liability; that the fact that the note in suit was not surrendered did not affect the character of the implied contract or its legal effect; and that the receipt of the money obtained upon the new note was a sufficient consideration, on the part of plaintiff, for such contract. *Id.*

— *When retiring partner stands as surety for firm debts.*  
See PARTNERSHIP, 7, 8.

## PULTENEY ESTATE.

See TREATY, 1, 3.

## QUESTION OF LAW AND FACT.

— *When question whether debtor had sufficient notice of assignment of claim is one of fact.*

See ASSIGNMENT, 5.

— *When question of practical location of boundary line one of fact.*

See BOUNDARIES, 3.

— *When breach of warranty question of fact.*

See INSURANCE (LIFE), 3.

— *In action against master for tortious act of servant, question whether servant was acting maliciously, in pursuance of his own purposes, not his master's, when one of fact.*

See MASTER AND SERVANT, 7.

— *When negligence question of law.*

See NEGLIGENCE, 3.

— *When negligence question of fact.*

See NEGLIGENCE, 4, 15.

— *When negligence question of fact.*

See *Haycroft v. L. S. and M. S. R. R. Co.* (Mem.) 655

— *When negligence question of law.*

See *Mitchell v. N. Y. C. and H. R. R. R. Co.* (Mem.) 655

## RAILROAD CORPORATIONS.

1. Plaintiff, a child five years old, resided with his mother on the first floor of a tenement-house communicating directly by a flight of stairs with the street. Plaintiff had been playing in the back yard, and came in for a drink of milk, which the mother gave to him, and he sat down at a table to drink it. She went into a bed-room adjoining, leaving the door open and telling him to go back into the yard. The door leading to the street was open. He went out on to the street, and in five minutes from the time his mother left him was run over and injured by one of defendant's cars, through the

- negligence of the driver. The mother testified that she had never known him to go out into the street alone before. In an action to recover damages for the injury, *held*, that the evidence did not establish contributory negligence on the part of the mother, as matter of law; but that it was a question of fact, and properly submitted to the jury. *Fallon v. C. P., N. and E. R. R. Co.* 18
2. The Supreme Court at Special Term has power to vacate an order confirming the report of commissioners appointed to appraise the compensation for lands sought to be taken for railroad purposes, and thereupon to set aside the report and to appoint new commissioners; the owner is not confined to the remedy by appeal to the General Term given by the general railroad act. (§§ 17, 18, chap. 140, Laws of 1850.) *In re Application N. Y. C. and H. R. R. Co.* 60
  3. Where cause is shown for thus setting aside the proceedings the court is the judge of the sufficiency thereof, and the granting such relief is within its discretion, the exercise whereof may be reviewed by the General Term, but not in this court. *Id.*
  4. The report of commissioners may be set aside for misconduct, palpable error or accident on the part of the commissioners such as would authorize the setting aside of a verdict or the report of a referee; and what would authorize a Special Term to excuse a default of a party and to set aside an inquest or a dismissal of a complaint taken at a Circuit, will empower it to vacate the order of confirmation. *Id.*
  5. Plaintiff jumped upon the platform of a baggage car on defendant's road to ride to a place where the cars were being backed to make up a train. Defendant's rules forbade all persons, except certain employes, riding on baggage cars and directed baggage-men to rigidly enforce the rule. As plaintiff's evidence tended to show, defendant's baggageman ordered plaintiff off while the car was in motion. A pile of wood was near the track. Plaintiff replied that he could not get off because of the wood, whereupon the baggagemaster kicked him off, he fell against the wood and then under the cars and was injured. In an action to recover damages, *held*, that the fact that plaintiff was a trespasser was not a defence, and that the evidence was sufficient to authorize the submission of defendant's liability to a jury. *Rounds v. D., L. and W. R. R. Co.* 129
  6. The court charged that if the brakeman acted "willfully and maliciously toward the plaintiff outside of and in excess of his duty" defendant was not liable. He refused to qualify this charge or to charge that it was sufficient to exempt defendant from liability that the act of the brakeman was willful. *Held*, no error. *Id.*
  7. Defendant subscribed to plaintiff's articles of association, which were duly acknowledged and filed. The company was organized under them, elected officers, constructed and put in operation its road and the company was recognized by the legislature. (Chap. 814, Laws of 1869.) Defendant paid in ten per cent of the stock subscribed for by him; calls were made for the balance which he declined to pay. In an action to recover the amount unpaid, *held*, it was no defence that said articles were defective in not definitely stating the termini of the road or the counties through which it passed, as, notwithstanding the defect, the shares of stock to which his subscription entitled him were shares in a corporation *de facto*. *C. L. R. R. Co. v. Kyle.* 185
  8. In an action to recover damages for the alleged negligent killing of plaintiff's intestate at a railroad crossing, the evidence showed that there were obstacles intercepting the view of the track from the highway upon which the deceased was approaching the crossing; and S., the employer of the deceased,



who was in the wagon with him and was driving, testified that he looked in both directions and did not see the approaching train, which was moving very rapidly. Defendant's testimony tended to show that from a point on the highway, 150 or 160 feet from the track, a train could have been seen for some distance. Defendant's counsel requested the court to charge that there being no evidence affirmatively showing that the deceased either looked or listened, or did any thing to guard against the dangers of the crossing, it was to be presumed that he did not look and was negligent. The request was refused. *Held*, no error; that the presumption was simply one of fact, and that the question of contributory negligence was properly left to the jury. *Massoth v. D. and H. C. Co.* 524

9. It does not necessarily follow from the fact that a skilled engineer can demonstrate that, from a given point in a highway, the track of a railroad is visible for any distance; that an individual in charge of a team approaching the track is negligent, because from the point specified he does not see a train approaching at great speed in time to avoid a collision. *Id.*

10. As to whether, in such a case, a servant riding with his master, who is driving, is chargeable with his master's negligence, *quære. Id.*

11. Irrespective of any ordinance or law regulating the speed of railroad trains at crossings, the running at an excessive rate of speed is negligence, and if a collision is caused thereby, the company is liable. As to whether the rate of speed is excessive or dangerous in the locality, is a question of fact for the jury. *Id.*

12. Whether the violation of a municipal ordinance regulating the rate of speed is, as matter of law, negligence, *quære. Id.*

18. Although a highway, crossing a railroad track, has been regularly laid out, yet until it has been

actually opened or notice "of such laying out" has been served upon an officer of the railroad corporation named in and as required by the act of 1853 (chap. 62, Laws of 1853), the duty imposed by the general railroad act, as amended in 1854 (§ 7, chap. 282, Laws of 1854), of ringing a bell or sounding a whistle upon a train approaching the crossing, does not attach; the highway is not "a traveled public road or street" within the meaning of said last-mentioned act. *Cordell v. N. Y. C. and H. R. R. Co.* 585

14. Ordinary care and prudence may require the giving of signals from an approaching train, to warn persons lawfully upon the track, and the omission to do so when so required will subject the corporation to liability for injury caused by the omission; but unless it is at a highway crossing in respect to which the statutory duty exists, the omission to give the designated signals is not negligence as matter of law, but the question of negligence is one of fact for a jury. *Id.*

— *When negligence in action against, question of fact.*

*See Haycroft v. L. S. and M. S. R. R. Co. (Mem.)* 686

— *When negligence in action against, question of law.*

*See Mitchell v. N. Y. C. and H. R. R. Co. (Mem.)* 655

## RATIFICATION.

A subsequent ratification by the mortgagor of a payment made by a third person without his previous request is equivalent to an original authority to make the payment. *Heermans v. Clarkson.* 171

— *Of unauthorized appropriation by agent of money of his principal, what will not amount to.*

*See Voltz v. Blackmar. (Mem.)* 646

— *Real property purchased by a firm, but deeded to one of the partners is held as personalty in trust for the firm.*

*See PARTNERSHIP, 9, 14.*

## RECEIVER.

- A receiver authorized to execute upon payment formal satisfaction and discharge of mortgages in his hands as such officer, has authority to receive payment of the amount secured by and to satisfy a mortgage, although the same be not due at the time. *Heermans v. Clarkson.* 171

## RECORDING ACT.

1. One who seeks to establish a right in hostility to a recorded title to or security upon land, under and by virtue of a prior unrecorded conveyance or prior equities, must show actual notice to the subsequent purchaser of his rights, or prove circumstances such as would put a prudent man upon his guard and from which actual notice may be inferred and found. *Brown v. Volkening.* 76
2. The possession which will be equivalent to actual notice to a subsequent purchaser must be an actual, open and visible occupation, inconsistent with the title of the apparent owner by the record, not equivocal, occasional or for a special or temporary purpose. Constructive possession will not suffice. *Id.*
3. The principle of constructive notice will not apply to an uninhabited and unfinished dwelling-house. (FOLGER, J., dissenting.) *Id.*
4. The provision of the recording act (1 R. S., 756, § 1), declaring every conveyance of real estate void, as against a subsequent *bona fide* purchaser of the same real estate, does not apply where two mortgages are executed at the same time, as neither one, although first recorded, is a subsequent conveyance. *Greene v. Warnick.* 220
5. The only effect of recording the assignment of a mortgage, is to protect the assignee from a subsequent sale of the same mortgage; if the assignment be not recorded,

it is void as against a subsequent purchaser of the same mortgage. *Id.*

6. B. executed at the same time two mortgages on certain real estate, one to M. G., and one to D., which it was understood were to be equal liens and to be recorded at the same time. M. G.'s mortgage was first recorded, and after D.'s mortgage was recorded, was assigned to E. G., and by him assigned to W., both being *bona fide* purchasers for value, without notice of the circumstances. *Held*, that W. took his assignment, subject to all the equities as between M. G. and D., and could claim no priority of lien because of his mortgage being first recorded; that M. G. was not a subsequent purchaser within the recording act, and even if W. could, by virtue of his assignment, be regarded as a subsequent purchaser of some interest in the real estate, he could claim no preference under the statute, as D.'s mortgage was recorded before the assignments. *Id.*

## RECOVERY OF POSSESSION OF REAL PROPERTY.

*See* EJECTMENT.

## REDEMPTION.

— *By tenant after ejectment, when six months statute begins to run.*  
*See* LANDLORD AND TENANT, 1.

## REFERENCE.

1. In an action tried by a referee where evidence is received competent as against one or more of several defendants, it is not error for the referee to refuse to decide, either at the time the evidence is received or at the close of the case, as to which of the defendants the evidence is competent. (CHURCH, Ch. J., ALLEN and FOLGER, JJ., dissenting.) *Lathrop v. Bramhall.* 365



2. A refusal of a referee to pass upon an objection to evidence at the time it is offered, and the receipt thereof with a reservation of the question as to its admissibility until the close of the case, is improper, but is not necessarily fatal to the judgment. (CHURCH, Ch. J., ALLEN and FOLGER, JJ., dissenting.) *Id.*

3. Such a reservation is to be considered upon appeal the same as if the objection had been overruled and an exception taken, and if the evidence were proper or could not have affected the rights of the objecting party injuriously, the reservation is not ground for reversal. (CHURCH, Ch. J., ALLEN and FOLGER, JJ., dissenting. *Id.*

— *Omission of referee to state conclusion of law resulting necessarily from fact found immaterial.*

See EJECTMENT, 9.

— *Findings in action for negligence, sufficiency of.*

See FINDINGS OF LAW AND FACT, 1.

— *Order of, to ascertain damages on injunction undertaking when properly granted, limit as to damages and form of final order on report.*

See INJUNCTION, 1, 2, 3, 5.

## REFORMATION OF CONTRACTS.

1. To justify a court of equity in changing the language of a written instrument sought to be reformed, in the absence of fraud, it must be established that both parties agreed to something different from what is expressed in the writing, and the proof should be so clear and convincing as to leave no room for doubt. *Mead v. W. F. Ins. Co.* 453

2. In an action to reform a policy of fire insurance upon a dwelling-house, the alleged mistake was that an adjoining building was intended to be insured instead of the dwelling described. It appeared that the applicant had owned both buildings and had lived in the one described; that defendant's agent had insured the furniture therein; that he had in-

sured the building claimed to have been intended and the policy was then outstanding. He had the description of both buildings upon his books. The applicant had removed from the dwelling to the adjoining building, which was occupied as a dwelling and paint shop, and did not, in fact, own the former. The agent, however, testified that he supposed that he did. The premium upon the dwelling was one and one-half per cent; upon the building it was two and one-half. The application was, by letter for a policy on "my house." The agent thereupon made out the policy in question upon the dwelling, charging one and one-half per cent. The building was burned. The only direct evidence to establish that defendant intended to insure the building was that of the agent, who, in answer to the question, "To what property do you understand this letter \* \* \* referred?" answered, to the property burned. Upon his cross-examination he testified, in substance, that at the time and before the policy was issued he was in doubt, but his idea was it was on the dwelling, and he so made out the policy. *Held*, that the facts did not show an intent, on the part of defendant, to insure the building burned, and did not justify a reformation of the policy. *Id.*

## RELIGIOUS CORPORATIONS.

1. Defendant, a religious corporation, organized under the general act of 1813 (chap. 60, Laws of 1813), purchased a lot, which was conveyed to it, and erected buildings thereon for a mission church and school. The persons then attending service were, with defendant's consent, incorporated. Defendant thereafter leased to the new corporation (plaintiff) the portion of the building used for a church, defendant still maintaining the mission school. Plaintiff's lease having expired, defendant refused to renew it. In an action brought to establish an interest in the property in plaintiff and to

restrain defendant from using or interfering with plaintiff's use of the premises, *held*, that plaintiff had no title to or interest in the property, and could not recover. Also, *held*, that the act of 1850 (chap. 122, Laws of 1850), if applicable, did not aid plaintiff, as it did not divest defendant of its property, but gave authority to purchase and to hold. *A. P. Church v. P. Church.* 274

2. To bring a case within the provision of said act (§ 4), authorizing a corporation organized under it to take into its possession and control real or personal estate, the property must have been given, granted or devised to it or to some person for its use. *Id.*

#### REMAINDER.

1. A remainder may be limited upon a bequest of money as well as of other personal property, and the testator may confide the money to a legatee for life, trusting to such legatee to preserve the fund for the benefit of the remainderman; in which case the legatee for life becomes trustee of the principal during the continuance of the life estate. *Smith v. Van Ostrand.* 278
2. The will of S. bequeathed to his wife the sum of \$1,650, in lieu of dower, for her support during her natural life or so long as she should remain his widow, then "her said dower" to be transferred to testator's three children, fifty dollars of said sum to be paid to the widow as soon as practicable after the testator's decease, and the residue in about six months thereafter. *Held*, that the bequest gave to the widow of S. the use of the \$1,650 during her life or widowhood, with power to apply so much of the principal as might be necessary for her support, but with no further power of disposition; and, subject to the exercise of this power, gave a remainder in the principal to the children; that this remainder was not repugnant to the prior gift and was valid; and that upon

the death of the widow, the children were entitled to so much of the fund as remained undisposed of for her support. *Id.*

— *Limited on estate in trustees for life, validity of.*

*See TRUSTS AND TRUSTEES, 11, 12.*

#### REMEDY.

— *Payment of damages on injunction undertaking to be enforced by action only.*

*See INJUNCTION, 5.*

— *To set off judgments, when by action instead of motion.*

*See SET-OFF, 4.*

#### REMOVAL OF CAUSE.

1. This action was brought originally against several defendants. Upon a former trial the complaint was dismissed as to all. Upon appeal to this court the judgment was affirmed as to all the defendants except Y., and reversed as to him and new trial granted. Y. thereupon filed a petition to remove the cause to the United States Court, under the act of July 27th, 1866 (14 U. S. Stat. at Large, 306), providing for a removal where one of several defendants is a resident of another State. *Held*, that the attempted removal was ineffectual, as at the time Y. was the only defendant, and that the court could take judicial notice of the fact from its own records. *Vose v. Yulee.* 449
2. Also, *held*, that Y. could not have made a case for removal as the action was originally, it being a claim against all the defendants upon a joint liability in equity. *Id.*
3. Where a party attempting to remove a cause omits to apply to the United States Court for a mandate staying proceedings in the State court, that court will not oust itself of jurisdiction unless such party shows that he has strictly complied with the statute. *Id.*

RESCISSION.

1. A parol lease of premises for a year to commence *in futuro* is not an executory contract prior to the time of taking possession. It vests a present interest in the term and cannot be rescinded by either party alone. *Becar v. Flues.* 518
2. In case, therefore, of the refusal of the lessee to perform, the lessor is not required to lease to another if he have an opportunity, and is not confined to his remedy for actual damages; but may refuse to accept the rescission and hold the lessee liable for the rent. *Id.*

ROCHESTER (CITY OF).

1. The board of public works of the city of R., passed an ordinance providing for the deepening and enlarging of a sewer, by enlarging a portion, constructing a tunnel under a race and deepening another portion. Bids were advertised for and received which were so much per foot for "open cut" and so much for tunneling. The contract was awarded to S., a portion to be "open cut" and the portion under the race tunneled. The board subsequently resolved that the work should be entirely tunneled, and a contract was entered into with S., without a re-advertisement, at the figures in his bid, which were five dollars per foot more for tunneling than for "open cut." In an action brought by persons assessed for the sewer, wherein judgment was obtained restraining the payment of any money for tunneling, save for the portion under the race; *held*, that the contract entered into was authorized by the ordinance, as the provision for deepening included any mode by which the work could be accomplished which the board, in the exercise of a reasonable discretion, should deem proper; that as the petition presented did not designate any particular mode of doing the work, there was no violation of the provision of the act of 1872 amending the city charter (§ 7, chap. 771, Laws of 1872), confer-

ring upon the owners the right to designate the kind of improvement; that having complied with the provision of said act (§ 8), requiring advertisements for proposals, the board was not required to advertise again, but had the authority to make the change before a contract in writing was entered into, and to adopt the proposal for tunneling in the accepted bid. *Lutes v. Briggs.* 404

2. Also, *held*, that the action could not be maintained by the plaintiffs, as by the provision of the charter of 1861 (§ 207, chap. 108, Laws of 1861), in case a greater amount was assessed and collected than was required for the improvement it was to be apportioned by the council and paid to the owners of property assessed, the remedy of plaintiffs was complete against the common council, not against the commissioners; that the case was not brought within the provision of the act of 1872 (chap. 161, Laws of 1872), providing for the prosecution of municipal officers at the suit of a resident tax-payer to prevent waste, etc., as there was no claim that the commissioners were liable to waste the fund, and as that act was intended to provide for cases where the remedy was doubtful, not to a case where the statute directly points out a mode of relief. *Id.*

RULES.

— Cannot alter statutory provisions.

See PARTIES, 6.

SALES.

1. Where A. sells out the stock and good-will of a retail business to B., covenanting not to engage in, or carry on, the same business within certain limits, it is not necessary in order to establish a breach of the covenant, to show that A. has solicited custom within the prescribed limits; if he, having established himself in the same

business outside of the district, systematically and for profit, to an extent to constitute the carrying on of a business, sends to the houses of customers within the district, receives orders and delivers goods, this is a breach of the covenant, although it is done at the request of the customers and without his solicitation. *Sander v. Hoffman.* 248

2. If, occasionally, to oblige an old customer, A. sells to him goods, this is not a breach. *Id.*

8. Defendants ordered of plaintiff, a dealer in, but not a manufacturer of, iron, ten tons of "XX pipe iron," to be used in the manufacture of castings for farming implements which required soft, tough iron. Plaintiff forwarded iron of the brand specified and billed it as such, which was accepted by defendant, without testing, and a large portion used, when it was discovered to be hard and brittle and unfit for the required purpose. In an action upon a note given for the purchase-money, wherein defendant set up as a counter-claim the damages sustained by the use of the iron, *held*, that there was a warranty of the character of the iron as "XX pipe iron," but not as to any certain quality of that brand, as plaintiff could not be presumed to know the precise quality of every lot bought and sold by him, and that plaintiff, in the absence of fraud, was only bound to deliver iron of the specified brand; that it was not enough that plaintiff knew the purpose for which it was required to bind him to deliver the quality required, defendant should have executed a specific warranty which would have survived the acceptance. *Dounce v. Dow.* 411

4. Also, *held*, that if a warranty that the iron was merchantable could be implied, defendant, by using a large portion of the iron after an opportunity to examine and ascertain the quality, must be deemed to have accepted it and to have waived the warranty. *Id.*

— *By parol of real estate, when enforceable.*

*See* STATUTE OF FRAUDS, 1.

— *Contract for sale of land, failure of consideration because of defect of title.*

*See* WILLS, 6.

### SET-OFF.

1. A promise made by one person for a valuable consideration, paid by another, to pay the debts of the latter, is in legal effect a promise to pay creditors who are such at the time the promise is made. They acquire thereby additional security for the payment of their debts, which will pass as an incident on assignment of one of the debts secured, but the assignee takes it by a derivative title from the assignor, and no direct contract is created by the assignment between him and the promisor. *Barlow v. Myers.* 41

2. It is immaterial that the debts are upon negotiable instruments not due. In the absence of special words indicating such an intent, the promise is not to the persons holding the instruments at their maturity; and the interest of the assignee in the promise is subject to any equities on the part of the promisor existing against the debt while in the hands of the assignor. *Id.*

8. Where, therefore, defendant, in consideration of the transfer to her of the property of the firm of R. & W., promised to pay the debts of the firm, among which were certain promissory notes not due, then held by N. R., who before maturity assigned them to plaintiff, in an action upon the promise, *held*, that defendant could set off a claim held by her against N. R. *Id.*

4. A right to set off a judgment in favor of A. against B., against a judgment in favor of B. against A. cannot be asserted by motion on behalf of A., where it appears that before B.'s judgment was obtained he assigned his claim to a

third person. If A. has any equities they can only be enforced by action, not by motion. *Swift v. Prouty*. 545

5. As to whether an order denying a motion to set off one judgment against another is reviewable here, *quære*. *Id.*

#### SPECIFIC PERFORMANCE.

— *Of parol contract for sale of land, when enforced.*  
See STATUTE OF FRAUDS, 1.

#### SPECIAL TERM.

— *Power to vacate order confirming report of railroad commissioners.*  
See MOTION AND ORDER, 1.

#### STATE.

1. The State cannot be compelled to proceed with the erection of a public building or the prosecution of a public work at the instance of a contractor therefor. *Lord v. Thomas*. 107
2. A law of the State suspending or discontinuing a public work under contract, or providing for its performance by different agencies, is not subject to any constitutional objection because the change authorized involves a breach of the contract; the obligation of the contract is not impaired by the refusal of the State to perform it; the contractor, if not in default, has a just claim against the State for damages resulting from the breach and a remedy by appeal to the legislature. *Id.*

— *Treaty between New York and Massachusetts and cession of lands by former.*

See TREATY, 1, 2, 3.

#### STATUTES.

See ACTS OF CONGRESS.  
CONSTITUTIONAL LAW.  
RECORDING ACT.  
STATUTE OF FRAUDS.

#### STATUTES.

— *Chap. 72, Laws of 1798.*  
See ALIENS.  
— *Chap. 322, Laws of 1844.*  
See APPEAL, 1.  
— *Chap. 163, Laws of 1870.*  
See BANKS AND BANKING, 5.  
— *2 R. S., 406, § 75.*  
See BILLS, NOTES AND CHECKS, 3.  
— *Chap. 519, Laws of 1870.*  
See BUFFALO (CITY OF).  
— *2 R. S., 668, § 10, et seq.*  
See BURGLARY, 1.  
— *Chap. 520, Laws of 1868.*  
— *Chap. 368, Laws of 1829.*  
— *Chap. 201, Laws of 1840.*  
— *Chap. 836, Laws of 1866.*  
— *Chap. 579, Laws of 1868.*  
See CANALS, 1.  
— *Chap. 19, Laws of 1821.*  
See CONSTITUTIONAL LAW, 7.  
— *Chap. 323, Laws of 1874.*  
— *Chap. 427, Laws of 1870.*  
See CONSTITUTIONAL LAW, 5.  
— *2 R. S., 146, § 48.*  
See DOWER, 1.  
— *2 R. S., 506, §§ 33, 34.*  
See EJECTMENT, 3, 8.  
— *Chap. 295, Laws of 1850.*  
See EXECUTION, 4.  
— *2 R. S., 724, §§ 27, 28.*  
See GRAND JURY, 1.  
— *Chap. 498, Laws of 1858.*  
— *Chap. 539, Laws of 1870.*  
— *Chap. 644, Laws of 1873.*  
See INDICTMENT, 5, 6, 8.  
— *Chap. 688, Laws of 1866.*  
See INNKEEPER, 1.  
— *Chap. 337, Laws of 1875.*  
See INSURANCE DEPARTMENT, 1.  
— *Chap. 40, Laws of 1848.*  
See MANUFACTURING CORPORATIONS, 1.  
— *Chap. 577, Laws of 1868.*  
See MUNICIPAL CORPORATIONS, 2.  
— *Chap. 875, Laws of 1869.*  
— *Chap. 130, Laws of 1842.*  
— *Chap. 335, Laws of 1873.*  
— *Chap. 332, Laws of 1852.*  
— *Chap. 569, Laws of 1857.*  
— *Chap. 563, Laws of 1868.*  
— *Chap. 52, Laws of 1852.*  
See NEW YORK (CITY OF), 1, 3, 8.  
— *1 R. S., 728, § 57.*  
See PARTNERSHIP, 14.  
— *Chap. 140, Laws of 1850.*  
— *Chap. 314, Laws of 1869.*  
— *Chap. 62, Laws of 1853.*  
— *Chap. 282, Laws of 1854.*  
See RAILROAD CORPORATIONS, 3, 7.  
— *1 R. S., 756, § 1.*  
See RECORDING ACT, 4.

## SURROGATES' COURTS.

As to whether heirs, devisees or terre-tenants can avail themselves of irregularities in proceedings before the surrogate to defeat a title to real property acquired under a sale by virtue of an execution authorized to be issued by the surrogate, *quære*. *Wallace v. Swinton*. 188

## TAXATION.

See ASSESSMENT AND TAXATION.

## TENDER

— *To agent, when insufficient.*  
See CONTRACTS, 13.

## TITLE.

— *When a religious corporation organized from congregation of and occupying mission church, acquires no title to building.*

See RELIGIOUS CORPORATION, 1, 2.

— *Title of Massachusetts and grantees to lands ceded by New York, held to be complete.*

See TREATY, 3.

## TOWNS.

See TOWN BONDING.

## TOWN BONDING.

1. Under section 1 of the act extending the power of boards of supervisors (§ 1, chap. 855, Laws of 1869, as amended by chapter 260, Laws of 1874), which confers power on said boards, with the consent of certain town officers, to authorize the borrowing of money on the credit of a town for the building and repair of roads and bridges, it is not essential that the town officers named should meet for the purpose of determining the amount to be borrowed on the first Monday of September;

the provision of said section requiring a meeting on that day in each year is directory merely, and it is sufficient if a meeting is held prior to the first Monday of October. *People ex rel. v. Tompkins*. 53

2. The provision of said section authorizing the board of supervisors to prescribe the form of obligation to be issued for the loan includes the naming of the town officer who is to execute the obligation, and they may impose this duty upon the supervisor of the town. *Id.*

3. Where the specified officers of a town have met within the time limited by the section and have determined the amount to be borrowed, and the board of supervisors has conferred the requisite authority to issue bonds of the town for the amount, no subsequent meeting of said officers is necessary for the purpose of authorizing or consenting to such issue. *Id.*

4. Where a supervisor of a town is required by the board to execute the bonds, it is no excuse for a refusal that the certificate of consent required by said section to be indorsed by the town clerk upon the bonds is not in due form; a proper certificate can be added as well after as before the execution, and it is the duty of the supervisor to see that any error is rectified. *Id.*

5. Section 2 of said act provides for a different and distinct class of cases from those provided for in section 1, and a supervisor of a town required to issue bonds under and in pursuance of section 1 is not justified in refusing so to do because two-thirds of the members of the board of supervisors did not assent to the resolution authorizing the loan and directing such issue, or because it did not receive his affirmative vote, as required in cases included in section 2. *Id.*

6. It is the duty of a town to provide means for the payment of its



bonds lawfully issued. In case of failure to perform this duty, the holder of the bonds may maintain an action against the town thereon; and this, although by the act under which they were issued, it is made the duty of the board of supervisors of the county to impose and levy a tax to pay the bonds. *Marsh v. Town of Little Valley*. 112

7. *It seems*, that the holder of the bonds having thus a legal remedy, could not resort to a mandamus against the board of supervisors. *Id.*

8. Such settled and admitted obligations of a town do not require to be audited and allowed by the board of town auditors. *Id.*

9. Under the provisions of the act of 1869 (chap. 590, Laws of 1869), legalizing the proceedings of a special town meeting of the electors of defendants at which a tax was voted for the payment of bounties to those furnishing substitutes under the call of the president of July, 1864, and making it the duty of the board of town auditors to audit and allow claims therefor, such board was authorized to audit the claims at a special meeting called for that purpose; they were not limited in their action to the annual meeting prescribed by statute for the auditing of town accounts. *Id.*

10. Under said act the officers authorized thereby (§ 3) to issue town bonds for the sums audited were vested with a discretion as to the form of the obligations and the time of payment. *Id.*

11. The repeal of said act by the act of 1873 (chap. 21, Laws of 1873) did not affect bonds already issued. The vested rights of the holders of the bonds cannot be defeated by subsequent legislation. *Id.*

#### TREATY.

1. This court will take judicial notice of the fact that the tract of land known as the "Pulteney

estate" was ceded by the State of New York to the State of Massachusetts by the treaty and deed of cession executed December 16, 1786, and that under the proper authority, State and national, the Indian title to said lands has been extinguished. *Howard v. Moot*. 262

2. As to whether the fact that the Indian right of occupation of lands within this State had not been extinguished with the sanction of the State government or abandoned by the Indians, can be set up by one without title, as against the owner in fee subject to such rights, *quære*. *Id.*

3. All the terms and conditions of the said treaty, upon which depended the right of Massachusetts and her grantees to an absolute and indefeasible estate in the lands granted, *held*, to have been substantially performed. *Id.*

#### TRESPASS.

1. The fact that the wife of A. owns the fee of the land on which stands the house in which he lives with his family, is not necessarily inconsistent with his having such a possession of the house as will entitle him to maintain an action against a trespasser for forcibly entering it. *Alexander v. Hard*. 228

2. Plaintiff built a house upon the land of his wife, in which he lived with his family, having possession and control thereof. He operated the farm in his own name, owned the stock and provided for his family. In an action for unlawfully and violently breaking into and entering the dwelling-house the court charged that plaintiff could not recover for damages to the house. *Held*, error; that the facts were sufficient to authorize a finding of a possession in plaintiff sufficient to entitle him to maintain the action. *Id.*

— *When transaction amounts to, instead of larceny.*

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— *When transaction amounts to, instead of larceny.*

*See CRIMINAL TRIAL, 4.*

## TRIAL.

1. One F. transferred to plaintiff by deed in trust, among other things, a demand against defendant for money loaned. F. subsequently brought suit against plaintiff to set aside the trust, in which action defendant was sworn as a witness. Plaintiff succeeded in the litigation. In an action upon the claim defendant proved payment to F. Plaintiff requested the court to charge that the pendency of said action brought by F. was constructive notice to defendant of the existence of the trust deed. The court refused so to charge. *Held*, no error; that whether defendant had notice of the character of the action sufficient to put him upon inquiry was a question of fact for the jury. *Heermans v. Ellsworth*. 159
2. In an action to recover damages for an injury resulting from a collision between plaintiff's carriage and one alleged to belong to defendant, through the negligence of the coachman driving the latter, the principal question on the trial was as to whether the carriage belonged to defendant or his daughter, to whom defendant claimed to have sold it and the horses. It was not claimed by defendant that the employment of the coachman was separate from the ownership of the carriage and horses, and the evidence showed them inseparably connected. The court charged that, if defendant did not own the carriage and horses, no recovery could be had. Defendant's counsel requested him to charge that if the jury find the coachman was not the servant of the defendant but of the daughter, they could not find for plaintiff. The court remarked that he did not see how he could separate the two things on the evidence, and said counsel excepted to the refusal to charge as requested. *Held*, that the remark could not be construed as a refusal to charge the request as a legal proposition, but only that as a question of fact; the ownership of the carriage and horses and the employment of the coachman could not be separated, and that the form of the exception did not change the effect of the decision. *Sloane v. Elmer*. 201
3. Plaintiff built a house upon the land of his wife, in which he lived with his family, having possession and control thereof. He operated the farm in his own name, owned the stock and provided for his family. In an action for unlawfully and violently breaking into and entering the dwelling-house the court charged that plaintiff could not recover for damages to the house. *Held*, error; that the facts were sufficient to authorize a finding of a possession in plaintiff sufficient to entitle him to maintain the action. *Alexander v. Hard*. 228
4. In an action upon a policy of life insurance the defence was the falsity of various answers to questions in the application which were, by the terms of the policy, made warranties. After the defendant's counsel had, upon the trial, specified certain answers which he claimed to be false, on motion to dismiss, in exceptions to the submission of questions to the jury and in requests to charge, he requested the court to charge that upon the policy and the evidence the plaintiff could not recover anything beyond the amount of the last premium. *Held*, that the general objection did not entitle defendant to raise on appeal points as to the falsity of answers which were not specified, and as to which no question of law was raised and passed upon on the trial. *Boos v. W. M. L. Ins. Co.* 236
5. In answer to a question as to whether he had had, during the last seven years, any severe sickness or disease, the insured answered "No." The policy was issued in 1870. Evidence was given showing that in 1865, the insured had an attack of pneumonia which lasted ten days, during which he was attended by a physician. Plaintiff's witnesses testified that during this time he was a strong, healthy man. One witness, not shown to be compe-

tent to speak as to the nature of the illness, testified that plaintiff had sunstroke in 1863, or 1865. *Held*, that the court was not bound to decide, as matter of law, that either was "a severe sickness or disease" within the meaning of the question, and that the question of a breach of warranty was one of fact for the jury. *Id.*

6. In an action tried by a referee where evidence is received competent as against one or more of several defendants, it is not error for the referee to refuse to decide, either at the time the evidence is received or at the close of the case, as to which of the defendants the evidence is competent. (CHURCH, Ch. J., ALLEN and FOLGER, JJ., dissenting.) *Lathrop v. Bramhall.* 365

7. A refusal of a referee to pass upon an objection to evidence at the time it is offered and the receipt thereof, with a reservation of the question as to its admissibility until the close of the case, is improper, but is not necessarily fatal to the judgment. (CHURCH, Ch. J., ALLEN and FOLGER, JJ., dissenting.) *Id.*

8. Such a reservation is to be considered upon appeal the same as if the objection had been overruled and an exception taken, and if the evidence were proper or could not have affected the rights of the objecting party injuriously, the reservation is not ground for reversal. (CHURCH, Ch. J., ALLEN and FOLGER, JJ., dissenting.) *Id.*

9. Where a party requests certain specified questions to be submitted to the jury for which there is no valid ground, it will be assumed that he intends to waive the submission of other questions, and a refusal to submit the case to the jury is proper. *Dounce v. Dow.* 412

10. An expression of opinion in a charge to a jury as to a question of fact, however decided, is not the ground of an exception, if no direction is given to the jury to find in accordance with such opin-

ion, and the question is fairly left to them to decide upon their own judgment. *Massoth v. D. and H. C. Co.* 524

— *Erroneous charge in action for false imprisonment.*

See CRIMINAL TRIAL.

FALSE IMPRISONMENT.

— *Erroneous charge on subject of fraud.*

See FRAUD, 1.

— *Charge as to liability of master for tortious act of servant, what proper.*

See MASTER AND SERVANT, 7.

## TRUSTS AND TRUSTEES.

1. A remainder may be limited upon a bequest of money as well as of other personal property, and the testator may confide the money to a legatee for life, trusting to such legatee to preserve the fund for the benefit of the remainderman; in which case the legatee for life becomes trustee of the principal during the continuance of the life estate. *Smith v. Van Ostrand.* 278

2. One F., in October, 1868, executed an instrument under seal, which, by its terms, conveyed to plaintiff certain real and personal estate, with power to sell and convey the lands "by retail for the best price that can be got," and, until such sale, to rent such of them as could be rented, and after defraying expenses and retaining five per cent for commissions, to pay over to F. the residue of the avails received during his life, and upon his death, after payment of his debts, to distribute the residue in the manner and to the persons specified. In December, 1870, F. executed to defendant R. a written contract for the sale to him of certain premises, part of the real estate included in said instrument, and R. went into possession under said contract. F. died in April, 1873. In an action to recover possession of the premises contracted to R., *held* (EARL, J. dissenting), that conceding plaintiff became seized under the instrument of an estate in the lands in trust for leas-

- ing with power of sale, as F. was entitled to receive to his own use all receipts from sales during his life, and as he could have compelled an execution of the trust by a sale, he having, instead of resorting to a court of equity for that purpose, made a sale, thus accomplishing the same result, R. not being in default, was in equity entitled to hold the premises as against plaintiff. *Heermans v. Robertson.* 332
8. Also, *held* (ALLEN, J.; ANDREWS and MILLER, JJ., concurring; EARL, J., dissenting), that no express trust was created by the instrument to come into effect at the death of F. *Id.*
  4. As to whether an express trust was declared for any of the purposes for which by law such trusts may be created, *quære.* *Id.*
  5. An intent to create an express trust will not be presumed in the absence of an express declaration to that effect, where the whole purpose of the deed, without peril to the rights of any one, can be accomplished under a power conferred by the deed. *Id.*
  6. The object of the provisions of the statute of uses and trusts, limiting express trusts, was to restrict them to cases in which it is necessary, for the protection of those interested, that the title or possession should vest in the trustee. Where no such necessity exists, the intent was that the trust should be executed as a power. (ALLEN, J.; ANDREWS and MILLER, JJ., concurring; EARL, J., dissenting.) *Id.*
  7. The object of the provision of the Revised Statutes (1 R. S., 728, § 55), authorizing an express trust to sell lands for the benefit of creditors, was to legalize a trust under an assignment for the benefit of creditors, where there is a necessity that the estate should pass. No such necessity exists in case of a trust created by deed to take effect at the death of the grantor, as the interests of all are effectually secured by construing the trust as a power. (ALLEN, J., ANDREWS and MILLER, JJ., concurring; EARL, J., dissenting.) *Id.*
  8. To effect a change in the order of marshaling assets for the payment of debts, there must be a positive direction clearly indicating an intent to relieve the class of assets primarily liable, and to charge some other portion of the estate therewith. A general direction for the payment of debts is not sufficient. *Id.*
  9. Accordingly, *held* (ALLEN, J.; ANDREWS and MILLER, JJ., concurring; EARL, J., dissenting), that by the instrument in question the property, the subject of the power, not being charged with the payment of debts, except as all the property of the deceased debtor is charged in its equitable order, and there being no conveyance of the property subject to the payment of debts so as to charge him as grantee *cum onere*, an intent to create a trust for the payment of debts could not be implied. *Id.*
  10. Real estate, purchased by a partnership but deeded to one of the copartners, is not within the provision of the statute of uses and trusts (1 R. S., 728, § 51), providing that when a grant for a valuable consideration shall be made to one person and the consideration paid by another, no use or trust shall result in favor of the person making the payment. The partner having title is a trustee for the firm, holding the property as personality; and when this trust is discharged by the payment of the debts and the settlement of the claims of the partners as between themselves, a trust in the remainder result, by operation of law to the other members of the firm and the heirs of such as have died, which is validated by the provision of the said statute (§ 50) preserving trusts arising or resulting by implication of law. *Fairchild v. Fairchild.* 471
  11. The validity of a trust to receive and apply the rents and profits of land, the duration of which cannot extend beyond the lives of two

designated persons, in being at the time of the creation of the trust, is not impaired by the circumstance that during the authorized period of suspension of the power of alienation, more than two persons are to enjoy the benefits of the income, or that some of the designated beneficiaries are not *in esse* at the time of the creation of the trust. *Woodgate v. Fleet*. 566

12. F. conveyed certain premises to trustees in trust: (1) to receive the rents and profits and apply to the support of his wife M., of J., and of any children of himself and M., thereafter born; (2) upon the arrival of J. at the age of twenty-one, to convey to him and to M., if unmarried, their proportions, to be determined by the number of children then living, the declared intent being to divide the property equally between M., J., and the living children; in case of the death of either, the share to which such person would have been entitled to go to the survivors; (3) if M. should be married when J. became of age, the trust as to her share to continue during her husband's life, and in case she should not survive her husband, her share to be vested in her heirs; (4) the shares of the after-born children to be held for them until they respectively arrived at full age. When J. became of age M. and four children were living. In an action to determine the rights of the parties, *held*, that the first trust and the limitation of the remainder in fee to take effect on J.'s becoming of age were valid, as was also the trust to continue during the life of M.; that the clause making provision in case of the death of one of the beneficiaries referred to a death before the division; that the concluding provision did not create an active trust, authorized by the Revised Statutes, but a mere passive trust under which the title passed directly to the beneficiaries; also, that even if the language could be construed as creating a trust void because of an unauthorized suspension of the power of alienation, it did not defeat the estate limited to the grantor's children. *Id.*

— *When one of a firm transfers his interest to a third person, who takes his place in the firm, firm assets charged with a trust for payment of debts.*

*See* PARTNERSHIP, 7.

— *Trusts under will defined.*

*See* WILLS, 6.

— *Validity of trust under deed, made in another State.*

*See* Hull v. Mitcheson (Mem.), 639.

— *When resulting trust created.*

*See* Helms v. Goodwill (Mem.), 642.

*See* Roulston v. Roulston (Mem.), 652.

### UNDERTAKING.

1. An order of reference, under section 222 of the Code, to ascertain damages upon an undertaking given upon the granting of an injunction, cannot be regularly granted until judgment has been entered; but where the order is entered by plaintiff's consent this obviates the objection. *Lawton v. Green*. 826
2. The limit of liability upon such an undertaking is the amount specified therein, and the court has no power to make any allowance beyond that amount for disbursements. Referee fees upon the reference are part of the damages, and recoverable as such. *Id.*
3. Accordingly, *held*, that an allowance for disbursements and referee fees over and above the sum specified in the undertaking was error. *Id.*
4. Such a proceeding is not a proceeding "in the action;" it is a proceeding after judgment, constituting no part of the action, and the court has no power to give costs therein. *Id.*
5. The final order in such proceedings should be limited to fixing the amount of damages, and a provision therein requiring the plaintiff to pay the same is improper. The amount of damages so ascertained is conclusive upon the parties and the sureties, but payment can only be enforced by action upon the undertaking. *Id.*

— On appeal, effect of release of sureties in, as to purchaser of premises incumbered by judgment appealed from.

See JUDGMENT, 8.

## USES.

See TRUSTS AND TRUSTEES.

## USURY.

1. The penalty recoverable from a national bank under the act of congress (U. S. R. S., § 5198), where a greater rate of interest than is allowed by law has been actually paid to and received by it, is twice the amount of the interest paid in excess of the legal rate, not twice the amount of the entire interest. *Hintermister v. First Nat. Bank.* 212
2. The forfeiture of the entire interest where more than lawful interest is received or reserved, attaches, and is enforceable only in actions brought to enforce the usurious contract. *Id.*
3. The provision is penal in its character, and is to be strictly construed. *Id.*
4. The party entitled to maintain the action is entitled to recover twice the amount he has paid for usury within two years prior to the commencement of the action, whether the amount was paid in one or several payments. *Id.*
5. It seems, that as the provision of the act of the legislature of this State of 1870 (chap. 163, Laws of 1870), amending the banking law of the State, was intended to put State banks upon an equality with national banks in respect to interest on loans and the penalty for taking usurious interest, it should receive the same interpretation as the act of congress; and as an interpretation has been given to the act of congress by the United States Supreme Court (*F. and M. N. Bk. v. Deering*, 1 Otto, 29), the same interpretation will be applied to the State law. A debt, therefore, contracted, or obligation given for a usurious loan made by a State or national bank is not void, but the forfeiture is limited to the interest. *Id.*
6. The right of a borrower to recover the excessive interest upon a usurious loan is assignable, and upon execution of an assignment in bankruptcy by the borrower vests in the assignee. *Wheelock v. Lee.* 242
7. This remedy existed prior to its affirmance by the statute of usury (1 R. S., 772, § 3), and it was not the intent of that statute to confine it to the borrower alone. *Id.*
8. This right to recover the usurious excess does not accrue until after the loan, with legal interest, has been paid. *Id.*
9. An assignee in bankruptcy, however, cannot maintain an action to compel a lender to deliver up collaterals turned out by the bankrupt to secure an usurious loan or to have an obligation given by him therefor declared void without paying or offering to pay the sum loaned. He is not a "borrower" within the meaning of the statute (chap. 430, Laws of 1837), authorizing a borrower to file his bill for relief without payment or deposit of the sum loaned; that word designates only the party bound by the original contract to pay the loan. *Id.*
10. A valid and subsisting obligation is not destroyed because included in a security or made the subject of a contract void for usury; although formally satisfied and discharged it may be revived and enforced in case the new security or contract is invalidated. *Patterson v. Birdsall.* 294
11. Plaintiff and H., being the owners of a mortgage upon defendants' premises, and having obtained judgment of foreclosure and sale thereon, agreed with defendants to bid in the premises, advance money to buy off a prior mortgage and to convey to defendant,



R. E. B., defendants, to execute a new bond and mortgage to them; the agreement was carried out. H. assigned his interest in the new bond and mortgage to plaintiff. Subsequently these were adjudged void for usury. In an action brought by plaintiff to be subrogated to the rights of the prior mortgagee and to foreclose the prior mortgage, *held*, that plaintiff and H., as junior incumbrancers, had, at the time of the usurious agreement, the right to pay the prior mortgage and to be subrogated; that this right was not destroyed by reason of entering into said agreement; but they were equitably entitled to the same benefits of the redemption as if made without such agreement, and by paying the debt they became entitled to a cession of the debt and a subrogation to all the rights of the mortgagee; and that the mortgage was to be regarded, as against the mortgagors, as still existing and uncanceled. *Id.*

#### VENDOR AND PURCHASER.

1. One who purchases the interest of a partner in a firm acquires simply a right to an accounting in respect to the partnership effects and to a share of the surplus remaining after payment of the partnership debts, deducting any balance that may be due from the vendor to his copartners upon an accounting. *Morse v. Gleason.* 204

2. Where a member of a firm transfers his interest therein to a third person, who is received into the firm as a partner in his stead, he thereafter occupies the position simply of surety for the firm debts to the extent that the assets of the firm are sufficient for their payment. Such assets are held by the new firm, charged with a trust for the payment of the debts of the old firm. *Id.*

— *When purchaser of land not bound to take title because of non-joinder of vendor's wife in deed.*  
See HUSBAND AND WIFE, 2.

#### WAIVER.

1. Where a party requests certain specified questions to be submitted to the jury for which there is no valid ground, it will be assumed that he intends to waive the submission of other questions, and a refusal to submit the case to the jury is proper. *Dounce v. Dow.* 411
2. A policy of fire insurance contained a condition requiring proofs of loss to be furnished by the insured within twenty days. It also contained a clause, in substance, that nothing save an agreement in writing, signed by an officer of the company, should be considered as a waiver of any condition or restriction in the policy. In an action upon the policy, *held*, that a local agent had no authority to waive such condition. *Van Allen v. F. J. S. Ins. Co.* 469

— *Of conditions in policy of fire insurance, what will not amount to.*

See INSURANCE (FIRE), 1, 2.

— *Of warranty on sale, by acceptance.*

See WARRANTY, 2.

#### WARRANTY.

1. Defendants ordered of plaintiff, a dealer in, but not a manufacturer of, iron, ten tons of "XX pipe iron," to be used in the manufacture of castings for farming implements, which required soft, tough iron. Plaintiff forwarded iron of the brand specified and billed it as such, which was accepted by defendant, without testing, and a large portion used, when it was discovered to be hard and brittle and unfit for the required purpose. In an action upon a note given for the purchase-money, wherein defendant set up as a counter-claim the damages sustained by the use of the iron, *held*, that there was a warranty of the character of the iron as "XX pipe iron," but not as to any certain quality of that brand, as plaintiff could not be presumed to know the precise quality of every lot bought and



sold by him, and that plaintiff, in the absence of fraud, was only bound to deliver iron of the specified brand; that it was not enough that plaintiff knew the purpose for which it was required to bind him to deliver the quality required, defendant should have executed a specific warranty which would have survived the acceptance. *Dounce v. Dow.* 411

2. Also, *held*, that if a warranty that the iron was merchantable could be implied, defendant, by using a large portion of the iron after an opportunity to examine and ascertain the quality, must be deemed to have accepted it and to have waived the warranty. *Id.*

*See* INSURANCE (LIFE).

## WIDOW.

— *Rights of.*

*See Roulston v. Roulston.* (Mem.) 652

## WILLS.

1. A will regularly admitted to probate can only be impeached for incapacity of the testator by reason of nonage or imbecility; competency will be presumed until the contrary is shown. *Howard v. Moot.* 262
2. A devise to alien trustees of lands held by an alien under the act of 1798, "to enable aliens to purchase and hold real estate within this State," etc. (chap. 72, Laws of 1798), is valid. *Id.*
3. A remainder may be limited upon a bequest of money as well as of other personal property, and the testator may confide the money to a legatee for life, trusting to such legatee to preserve the fund for the benefit of the remainderman; in which case the legatee for life becomes trustee of the principal during the continuance of the life estate. *Smith v. Van Ostrand.* 278

4. The will of S. bequeathed to his wife the sum of \$1,650, in lieu of dower, for her support during her natural life or so long as she should remain his widow, then "her said dower" to be transferred to testator's three children, fifty dollars of said sum to be paid to the widow as soon as practicable after the testator's decease, and the residue in about six months thereafter. *Held*, that the bequest gave to the widow of S. the use of the \$1,650 during her life or widowhood, with power to apply so much of the principal as might be necessary for her support, but with no further power of disposition; and, subject to the exercise of this power, gave a remainder in the principal to the children; that this remainder was not repugnant to the prior gift and was valid; and that upon the death of the widow, the children were entitled to so much of the fund as remained undisposed of for her support. *Id.*

5. Upon the death of S., his widow received from the executors the money bequeathed, and with it bought United States bonds, which she held at the time of her death. *Held*, that the children of S., not his executors, were entitled to the bonds and were the proper parties to bring an action for their conversion; that the executors having paid over the money as required by the will, were discharged from all liability and divested of all power concerning it. *Id.*

6. The will of P. devised and bequeathed the residue of his estate, real and personal, after payment of debts, to his executors in trust, to rent and invest and pay the rents and income to his wife during her life, and immediately upon her death to divide the same into seven equal parts, and to hold the parts separately each during the life of a child of the testator named in connection therewith, paying to such child the rents and income, with directions upon the death of such child to convey, assign and deliver over said seventh part to his or her

lawful issue; if no lawful issue, to the wife or husband of such child, if surviving: if not, then to the testator's right heirs, with power to the executors during the existence of the respective trusts to sell and convey, change investments, etc. The wife of the testator died during his life. Two of the children also died before him, unmarried and without issue, H., another child, died after the testator, leaving issue. Plaintiff, after such death, contracted to purchase of the trustees a portion of the real estate. No division of the estate into shares had been made. In an action to recover back the purchase-money paid on the contract, *held*, that the two-sevenths designed for the two children who died before the testator, did not go to the trustees, but went directly to the testator's right heirs; that the estate vested in the trustees in the one-seventh held for the benefit of H. terminated upon his death; that the power to convey after the death of the *cestui que trust* to his issue did not constitute a trust or require the estate to be vested in the trustees, but was a power in trust merely which neither defeated nor delayed the vesting of the estate in those entitled in remainder; that the power to sell and change investments was a several power in respect to the property held under the respective trusts—not a general power embracing the whole estate to be exercised as long as any of the trusts continue—and that, therefore, as the trustees could not convey such title as plaintiff was bound to ac-

cept, the consideration had failed, and he was entitled to recover.  
*Bruner v. Meigs.* 506

## WRIT OF ERROR.

— *Will not lie to review order quashing writ of habeas corpus.*  
*See APPEAL, 9.*

## WRIT OF POSSESSION.

1. A writ of possession issued upon a judgment in ejectment can lawfully be executed after the return day thereof; the office of the writ is simply to carry into effect the judgment, and the command to return within sixty days is directory merely. *Wilbock v. Van Rensselaer.* 27
2. Although it is the duty of the sheriff, in executing such writ, if required to remove from the premises the personal property thereon, the omission to do so does not vitiate the execution of the writ when possession of the land is delivered. *Id.*
3. Where the action was brought by a landlord because of non-payment of rent and possession is delivered to him or his assignee, the statute giving to the defendant six months after such taking possession in which to redeem (2 R. S., 506, § 33) begins to run, and the time limited for redemption is not enlarged by a subsequent re-entry of the tenant. *Id.*

## ERRATA.

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In the Index to 63 New York the title "Parties," with entries under it, appearing on page 725, should be transferred to page 722, after "Oyer and Terminer."

The case of *Holden v. Burnham* (63 N. Y., 74) is indexed under the head of "Fraud" (Index, p. 699); it should be under the head of "Fraudulent Conveyances."

In title to case *Babcock v. City of Buffalo* (56 N. Y., 268), the plaintiff Babcock should be stated as respondent and the defendants as appellants.

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